The Protection of the Right to Education by International Law

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The Protection of the Right to Education by International Law

Including a Systematic Analysis of Article 13 of the International Covenant on Economic, Social and Cultural Rights

by

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To my parents,
my brother, my sister
&
Yvonne

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PREFACE

This book originated as a doctoral thesis at the Ludwig-Maximilians-Universität in Munich, Germany. Writing this preface concludes several years of hard but exciting work. It took me three years to produce the thesis, which I handed in on 3 April 2003. Subsequently, I updated the manuscript so that the text of this book reflects the state of the law as on 15 March 2005. Certain earlier-dated legal materials not accessible to me as on the latter date have not been taken into account. It has been my ambition to deal with the topic of the book in a comprehensive manner, *i.e.* to cover all salient issues concerning the protection of the right to education by international law in adequate detail to render the discussion meaningful. But, as one may imagine, it is virtually impossible to accomplish this goal. I therefore apologise, if aspects considered important have not been addressed or have not been addressed in sufficient detail. On a technical point, unless indicated otherwise, the use of the masculine form in this book also includes the feminine form.

It remains for me to thank all those who contributed in one way or another to the preparation of this book. At the same time, I emphasise that solely I am responsible for its content and any mistakes it may contain. The research for this book was mainly carried out at the Department of Public International Law of the University of Munich. My special thanks go to Prof. Dr. Bruno Simma, formerly Head of Department (now Judge at the International Court of Justice), for the research facilities granted to me at his department, for having supervised the writing of the thesis and for having written the first rapporteur's report on the thesis. I also wish to thank Dr. Markus Zöckler, attached to the department, for his administrative and technical support. I further thank Prof. Dr. Moris Lehner of the Institute for Political Science and Public Law who wrote the second rapporteur's report on the thesis. Then I would like to thank Dr. Richard Lord of the University of Cape Town, South Africa, a friend of mine, for having proof-read the script. Likewise, I wish to thank the German Academic Exchange Service for its financial assistance, which, in fact, made possible my doctoral studies in Germany and the writing of this book. Finally, I express my deepest gratitude to Yvonne, whose moral support helped me to bring this project to an end.

In conclusion, may I state that I would appreciate receiving comments, suggestions and criticism concerning any aspect of this book at my e-mail address at klausbeiter@gmx.de.

Munich, 18 April 2005 Klaus Dieter Beiter

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- *Arieh Hollis Waldman v. Canada*, HRC, Communication No. 694/1996, 05/11/1999, UN Doc. CCPR/C/67/D/694/1996 (9.3.3.3.3.3., 10.5.2.2.)
- *Carl Henrik Blom v. Sweden*, HRC, Communication No. 191/1985, 04/04/1988, UN Doc. CCPR/C/32/D/191/1985 (10.5.2.2.)
- *Erkki Hartikainen v. Finland*, HRC, Communication No. 40/1978, 09/04/1981, UN Doc. CCPR/C/12/D/40/1978 (10.5.1.3.3.2., 10.5.1.5.)
- *F.H. Zwaan-de Vries v. the Netherlands*, HRC, Communication No. 182/1984, 09/04/1987, UN Doc. CCPR/C/29/D/182/1984 (3.4.1., 9.3.2.2.)
- *G. and L. Lindgren and L. Holm, A. and B. Hjord, E. and I. Lundquist, L. Radko and E. Stahl v. Sweden*, HRC, Communications Nos. 298/1988 and 299/1988, 07/12/1990, UN Doc. CCPR/C/40/D/298/1988 (10.5.2.2.)
- *Malcolm Ross v. Canada*, HRC, Communication No. 736/1997, 26/10/2000, UN Doc. CCPR/C/70/D/736/1997 (10.4.1.3.1.)

European Committee of Social Rights

European Court of Justice

INTERNET RESOURCES

- United Nations (UN):
  www.un.org
- UN Treaty Collection:
  http://untreaty.un.org/English/treaty.asp
- Office of the UN High Commissioner for Human Rights (UNHCHR):
  www.ohchr.org
- UN Commission on Human Rights:
  www.ohchr.org/english/bodies/chr/index.htm
- UN Sub-Commission on the Promotion and Protection of Human Rights:
  www.ohchr.org/english/bodies/subcom/index.htm
- Special Rapporteur of the UN Commission on Human Rights on the Right to Education:
  www.ohchr.org/english/issues/education/rapporteur/index.htm
- United Nations Educational, Scientific and Cultural Organisation (UNESCO):
  www.unesco.org
- UNESCO's Education for All (EFA) website:
  www.unesco.org/education/efa/index.shtml
- International Labour Organisation (ILO):
  www.ilo.org
- United Nations Children's Fund (UNICEF):
  www.unicef.org
- World Bank:
  www.worldbank.org
- World Trade Organisation (WTO):
  www.wto.org
- Organisation for Economic Co-operation and Development (OECD):
  www.oecd.org
- Council of Europe:
  www.coe.int
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  www.echr.coe.int
- European Union (EU):
  http://europa.eu.int
- Organisation for Security and Co-operation in Europe (OSCE):
  www.osce.org

- Organisation of American States (OAS):
  www.oas.org
- Inter-American Commission on Human Rights:
  www.cidh.org
- Inter-American Court of Human Rights:
  www.corteidh.or.cr
- African Union (AU):
  www.africa-union.org
- African Commission on Human and Peoples' Rights:
  www.achpr.org
- Human Rights Library of the University of Minnesota:
  www1.umn.edu/humanrts/index.html
- Right to Education Project (public access human rights resource, founded by Katarina Tomaševski, former Special Rapporteur of the UN Commission on Human Rights on the Right to Education):
  www.right-to-education.org
- Education International (EI) (an international federation of organisations representing teachers and other education workers):
  www.ei-ie.org
- Global Campaign for Education (GCE) (an international alliance of development organisations and teachers' unions who promote education as a human right):
  www.campaignforeducation.org
- International Organisation for the Development of Freedom of Education (OIDEL) (an international non-governmental organisation):
  www.oidel.ch

LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ACRWC	African Charter on the Rights and Welfare of the Child
AP ACHR	Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights
AU	African Union
CDE	Convention against Discrimination in Education
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
ComRC	Committee on the Rights of the Child
CPR	civil and political rights/a civil and political right
CRC	Convention on the Rights of the Child
CSCE	Conference on Security and Co-operation in Europe
Doc.	document
DR	Decisions and Reports
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECOSOC	Economic and Social Council of the United Nations
EFA	Education For All
ESC	European Social Charter
ESCR	economic, social and cultural rights/an economic, social and cultural right
ETS	European Treaty Series
EU	European Union
GDP	gross domestic product
GNP	gross national product
HCNM	High Commissioner on National Minorities
HIV/AIDS	human immunodeficiency virus/acquired immune deficiency syndrome
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights

ICJ	International Court of Justice
ILO	International Labour Organisation
NGO(s)	non-governmental organisation(s)
OAS	Organisation of American States
OAS Treaty Series	Organisation of American States Treaty Series
OAU	Organisation of African Unity
OECD	Organisation for Economic Co-operation and Development
OSCE	Organisation on Security and Co-operation in Europe
P-1 ECHR	Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms
Revised ESC	Revised European Social Charter
TVE	technical and vocational education
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDP	United Nations Development Programme
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNFPA	United Nations Population Fund
UNGA	United Nations General Assembly
UNHCHR	United Nations High Commissioner for Human Rights
UNICEF	United Nations Children's Fund
UNTS	United Nations Treaty Series
USA/US	United States of America/United States

EXPLANATION OF DOCUMENT SYMBOLS

Explanation of symbols of UN documents

A/ . . .	document of the UN General Assembly
E/ . . .	document of the UN Economic and Social Council
E/CN.4/ . . .	document of the UN Commission on Human Rights
E/CN.4/Sub.2/ . . .	document of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities/UN Sub-Commission on the Promotion and Protection of Human Rights
E/C.12/ . . .	document of the UN Committee on Economic, Social and Cultural Rights
CCPR/C/ . . .	document of the Human Rights Committee
CRC/C/ . . .	document of the Committee on the Rights of the Child
Add.	Addendum
Rev.	Revision
SR.	Summary Record (official report of meeting)

Explanation of symbols of UNESCO documents

. . . C . . .	document of UNESCO's General Conference
. . . EX . . .	document of UNESCO's Executive Board

CHAPTER ONE

INTRODUCTION

Education is the great engine of personal development. It is through education that the daughter of a peasant can become a doctor, that a son of a mineworker can become the head of the mine, that a child of farm workers can become the president of a great nation. It is what we make out of what we have, not what we are given, that separates one person from another.

—*Nelson Mandela*

1. *The Topic of this Book*

The above quotation of Nelson Mandela reflects a generally held belief, namely, that education is a valuable good. It is unanimously accepted that education contributes to the development of the human personality and that it constitutes a source of knowledge. In accordance with this belief, education has been accorded the status of a human right in many national constitutions. But, it has also been recognised as a human right at the international level. International agreements, which protect education as a human right—that is, a right to education—have been prepared by international organisations, for example, the United Nations (UN) or the United Nations Educational, Scientific and Cultural Organisation (UNESCO), and, likewise, by regional organisations, such as the Council of Europe. The agreements concerned usually also protect other human rights, often economic, social and cultural rights, the category of human rights to which the right to education is generally considered to belong. Most notably, the right to education is provided for in article 13 of the International Covenant on Economic, Social and Cultural Rights of 1966. Article 13 may arguably be viewed as the most important formulation of the right to education in an international agreement. Even though international law defines education as a human right ever since that right has first been laid down in 1948 in article 26 of the Universal Declaration of Human Rights, the educational situation in many states leaves much to be desired, even at the beginning of the twenty-first century. It has thus recently been observed:

> At the dawn of the new century 875 million of the world's citizens are illiterate. One out of every five children aged 6–11 in developing countries—an estimated 113 million—is not in school, 60 per cent of them are girls.

> Nine countries—Bangladesh, Brazil, China, Egypt, India, Indonesia, Mexico, Nigeria and Pakistan (E9)—are home to 70 per cent of the world's illiterates.
>
> Girls and women are most at risk. In South Asia an estimated 60 per cent of women are illiterate. Worldwide, one women in four cannot read.
>
> In South Asia and sub-Saharan Africa, less than three out of four pupils reach Grade 5.
>
> The HIV/AIDS pandemic threatens to wipe out much of the progress made in boosting literacy and general education levels. Up to 10 per cent of teachers are expected to die in the worst-affected African countries.[1]

By having ratified international agreements in which the right to education is protected, states parties thereto assume obligations under international law, enjoining them to realise the right to education and to respect freedom in education. This is significant. Addressing the unsatisfactory situation concerning education described above and ensuring access to education to all persons is therefore not so much a matter of meeting basic human needs, developing human resources or achieving the objectives of socio-economic development. It is rather a matter of observing rights protected by law. This is the topic of this book—education as a human right protected by international law. As a human right laid down in international agreements, the failure of a state to comply with the right to education amounts to a violation of international law, entailing the international responsibility of the state.

2. *The Aims of this Book*

Despite the fact that the right to education is protected in several human rights treaties, the emerging trend is not to define education as a "human right" anymore, but to call it a "human need". This trend started at the World Conference on Education for All, held at Jomtien, Thailand from 5 to 9 March 1990, the Conference marking the beginning of the so-called Education for All (EFA) process. The Conference adopted the World Declaration on Education for All, article 1(1) of which states that "[e]very person . . . shall be able to benefit from educational opportunities designed to meet their basic learning needs . . .". Also more recent EFA documents refer to "needs" rather than "rights". The result of demoting education from "right" to "need" is that education thereby becomes a commodity which may be traded against a price. Those unable to pay the price will be excluded from education or, at best, receive education of a low quality. Defining education as a "human right" entails different consequences:

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[1] UNESCO, *Education for All: An Achievable Vision*, Paris: UNESCO, 2000, p. 3.

Access for all to free/affordable education of a high quality must then be assured by the state. The state will be the bearer of obligations with regard to education. A failure to comply with these obligations constitutes a human rights violation, for which the state is accountable. It will then be obliged to compensate victims and/or to secure that a failure does not happen again. In the light of the emerging trend of avoiding human rights language when addressing educational topics, a need exists "to rescue the right to education from disappearance".[2] It is hoped that this book will contribute to achieving this end, by referring to and analysing the numerous international instruments, which protect education as a human right. This is *the first aim* of this book.

But, even where states do recognise education as a human right and are willing to comply with international agreements protecting the right to education, they often fail to make noticeable progress in improving the educational situation in human rights terms. The reason for this is that many states do not know what the right to education demands of them. That is so because the nature of the right to education is not always easy to comprehend. The right to education, like all other economic, social and cultural rights, entails important positive duties. Economic, social and cultural rights are rights concerning a person's living and working conditions. They seek to guarantee a person an adequate standard of living. States are obliged to take active steps, to the maximum of their available resources, to realise these rights progressively. This contrasts with the character of civil and political rights—the other important category of human rights—with which states are more familiar. Civil and political rights are essentially negative in nature. They oblige states to refrain from unduly interfering with the individual's sphere of personal freedom. The fact that the right to education entails positive duties, and thus leaves many policy options to states, makes it difficult for states to know exactly what is expected of them to guarantee the exercise of this right. At the same time, it is important to realise that the right to education also has elements which characterise it as a civil and political right. In other words, the right to education has two aspects: a social and a freedom aspect. The former requires states to take active steps aimed at realising the right to education, the latter requires them to respect free choice of education and the freedom to set up and run private schools. It is evident from what has been stated that an effort needs to be made to identify and describe the various obligations flowing from the right to education, as protected in international agreements. This is not (purely) an academic exercise, but necessary to guide

[2] Tomaševski, 2001b, p. 16.

states in their endeavours to comply with the international agreements concerned. *The second aim* of this book is to assist in the making of that effort.

To achieve the above two aims—affirming education as a human right under international law and identifying and describing the obligations for states under provisions in international agreements protecting that right—this book will set out to accomplish the following:

Firstly, it will try to show that education is widely recognised as a human right. It has thus been held that it is a requirement of human dignity to recognise education as a human right. The historical development of human rights law in the Old World also bears out that education increasingly came to be seen as a human right. A closer study further reveals that, in some way or another, all political, social, religious and cultural communities in the world support the individual's claim to be educated. A recognition of education as a human right has also occurred at the level of international law. Numerous international declarations and agreements provide for a right to education.

Secondly, this book will examine the nature of the right to education. This will be done in the wider context of looking at economic, social and cultural rights. Economic, social and cultural rights have been severely criticised. An attempt will be made to dispel this criticism and to raise arguments in support of economic, social and cultural rights. Questions relating to the character of economic, social and cultural rights, their relationship with civil and political rights, whether economic, social and cultural rights are justiciable and what the obligations of states are in terms of treaties which protect economic, social and cultural rights, will be attempted to be answered.

Thirdly, this book will try to determine the content of the right to education under international human rights law. Provisions on the right to education are found in many instruments of international law. They may be found in instruments adopted by the UN (*e.g.* articles 13 and 14 of the International Covenant on Economic, Social and Cultural Rights of 1966, or articles 28 and 29 of the Convention on the Rights of the Child of 1989), instruments adopted by UNESCO (*e.g.* in the Convention against Discrimination in Education of 1960), instruments adopted by the Council of Europe (*e.g.* article 2 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1952), and many other treaties, declarations and recommendations adopted in various contexts. These instruments will be classified according to whether they have been adopted at the international or regional level. Instruments adopted by the Specialised Agencies of the UN (in our case, these are the United Nations Educational, Scientific and Cultural Organisation (UNESCO) and the International Labour Organisation (ILO)) will be dealt with sep-

arately. The provisions on the right to education in the different instruments will be cited in full. They will then be discussed in the light of relevant materials, such as the *travaux préparatoires* of the applicable instruments, any available case law or the opinions of writers on the topic.

Fourthly, this book will attempt to describe the diverse procedures provided for by international law for supervising the implementation of the right to education. These may take the form of reporting procedures, interstate petition procedures or individual petition procedures.[3] Apart from discussing the supervisory system provided for under the International Covenant on Economic, Social and Cultural Rights (see the paragraph below), reference will, in particular, be made to the supervisory procedures which exist with regard to UNESCO's legal instruments. With regard to the Convention against Discrimination in Education, for example, there exists a system of consultations based on state reports and an interstate complaints procedure. UNESCO further knows an individual complaints procedure.

Fifthly, this book will endeavour to systematically analyse article 13 of the International Covenant on Economic, Social and Cultural Rights. It has been stated above that this provision may perhaps be viewed as the most important formulation of the right to education in an international agreement. For this reason, *article 13* has been chosen for the purposes of a systematic analysis. In this writer's view, focusing on the provision of one specific human rights instrument makes it possible to thoroughly and accurately describe the various state obligations flowing from the right to education. An attempt will first be made to comment on the general nature of state obligations in terms of article 2(1) of the International Covenant. An attempt will subsequently be made to define the specific state obligations flowing from article 13. The analysis will also consider how the Committee on Economic, Social and Cultural Rights, the body which supervises the implementation of the Covenant, interprets article 13. The Covenant's supervisory system, a reporting procedure, will be explained. It will be suggested that the supervision of rights under the Covenant, including that of the right to education, may be improved by creating an individual/group complaints procedure with regard to Covenant rights.

It may be asked why the right to education is examined in a comprehensive manner, and why the focus is not on a specific aspect of that right, as this might, perhaps, yield more concrete findings. So far, little has been written on the protection of economic, social and cultural rights, in general, and the right to education, in particular, under international law, especially if compared with the extensive literature on civil and political

[3] What these supervisory procedures entail, will become apparent in the course of the discussion.

rights. Therefore, the emerging literature, which this book is a part of, must first treat the right to education as such, to disclose the manifold aspects of that right, before any of these aspects may be meaningfully subjected to closer scrutiny.

There exist a few other studies which also deal with the right to education in international law.[4] The current study differs from these, however, in important respects. Seeing that the stated studies undertake a detailed analysis of the *travaux préparatoires* of the diverse provisions on the right to education in international instruments, this will not be repeated in the present book. The preparatory works will only be referred to occasionally. The discussion of article 13 of the International Covenant on Economic, Social and Cultural Rights will rather examine the interpretative materials produced by the various bodies monitoring human rights treaties, in particular, those produced by the Committee on Economic, Social and Cultural Rights—its Concluding Observations, materials related to its Day of General Discussion on the right to education and its General Comments Nos. 11 and 13 on the right to education.[5] Applicable international case law, notably that of the former European Commission of Human Rights and the European Court of Human Rights, and national case law will also be taken into account. Furthermore, this book will also cover topics not addressed or addressed only briefly in the mentioned studies. These include, to mention but a few examples, the protection of the right to education by international legal instruments protecting the rights of refugees, migrants, the disabled, the elderly and detained persons, the protection of the right to education in the context of the European Union (EU) and the Organisation on Security and Co-operation in Europe (OSCE), the content and supervision of the various legal instruments on education adopted by UNESCO (*i.e.* not only of the Convention against Discrimination in Education), the Education for All (EFA) process, problems associated with the human capital approach to education and with free trade in education services, and respect for the right to education in bilateral and multilateral development co-operation activities focusing on education. Moreover, this book will put an emphasis on certain topics not similarly emphasised in the stated studies. This will be done, in particular, with regard to the topic of minority education rights. There will thus be a discussion of the provisions protecting minority education rights in international instruments, of similar provisions in regional instruments, of the protection of such rights under the minority treaties concluded after the First World War, of the OSCE's

[4] See Lonbay, 1988, Coomans, 1992 and Gebert, 1996.

[5] What Concluding Observations, Days of General Discussion and General Comments are, will become apparent in the course of the discussion.

Hague Recommendations Regarding the Education Rights of National Minorities, of the education rights of minorities in the matter of religion, *etc.* Finally, this book will process and refer to diverse materials which were not available when the mentioned studies were written, such as General Comments Nos. 11 and 13 of the Committee on Economic, Social and Cultural Rights and the reports prepared by the Special Rapporteur of the Commission on Human Rights on the Right to Education, the position having been created in 1998.

3. *The Structure of this Book*

This book will be divided into two parts, Part A and Part B. The former will undertake a general analysis of the protection of the right to education by international law, the latter a systematic analysis of article 13 of the International Covenant on Economic, Social and Cultural Rights.

PART A will thus outline how international law protects the right to education. It will mention and briefly discuss the many international and regional legal instruments and the legal instruments adopted by UNESCO and the ILO as Specialised Agencies of the UN, protecting the right to education. A few words will also be said on the history and nature of the right to education, on economic, social and cultural rights as the category of human rights to which the right to education (also) belongs, and on activities at the international level, such as international conferences and initiatives, aimed at promoting the right to education.

Part A will consist of six chapters, Chapters 2 to 7. *Chapter 2* will make some introductory remarks on the right to education and will discuss topics like the definition of the term "education", the historical development of the right to education, the philosophical basis of the right, the right to education as an empowerment right, the compulsory nature of primary education, the universality of the right to education, its classification, and the right to education as part of customary law. *Chapter 3* deals with the category of economic, social and cultural rights. An attempt will be made to disprove the arguments often raised against economic, social and cultural rights, and to present arguments in support of economic, social and cultural rights. This is considered necessary before proceeding with the discussion of the right to education, as the fate of the right to education, as an economic, social and cultural right, hinges on that of economic, social and cultural rights as a category. The next three chapters, *i.e.* Chapters 4, 5 and 6, will then describe the protection of the right to education by instruments of international law. *Chapter 4* will discuss the provisions on

the right to education found in instruments prepared at the international level (excluding those found in instruments of the Specialised Agencies of the UN, which will be discussed in Chapter 6). The relevant provisions of the International Bill of Human Rights, *i.e.* article 26 of the Universal Declaration of Human Rights, articles 13 and 14 of the International Covenant on Economic, Social and Cultural Rights and article 18(4) of the International Covenant on Civil and Political Rights, will be dealt with. Likewise, articles 28 and 29 of the Convention on the Rights of the Child will be dealt with. Chapter 4 will also mention the provisions on the right to education found in instruments concerning discrimination, refugees, migrants, disabled persons, older persons, detained persons, minorities and indigenous peoples. *Chapter 5* will then discuss the provisions on the right to education found in instruments prepared at the regional level. Article 2 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (and some of the case law of the former European Commission of Human Rights and the European Court of Human Rights on article 2), article 13 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights and article 11 of the African Charter on the Rights and Welfare of the Child will be dealt with. *Chapter 6* will discuss the provisions on the right to education found in instruments adopted by UNESCO and the ILO as Specialised Agencies of the UN, focusing on UNESCO's instruments. After having commented on the mandate and organisational structure of UNESCO, the setting of international educational standards by UNESCO and the monitoring of such standards by UNESCO, the legal instruments on education which have been adopted by UNESCO and their supervision will be discussed. Regarding the stated instruments, the emphasis will be on the content and supervision of the Convention against Discrimination in Education. Finally, *Chapter 7* will briefly refer to activities at the international level, such as international conferences and initiatives, aimed at promoting the right to education. Two initiatives will be considered in more detail, namely, the so-called Education for All (EFA) process and the activities of the Special Rapporteur of the Commission on Human Rights on the Right to Education, the stated position having been created in 1998.

PART B will then undertake a systematic analysis of article 13 of the International Covenant on Economic, Social and Cultural Rights. The Covenant forms part of the International Bill of Human Rights, which purports to lay down universally accepted human rights standards. The Committee on Economic, Social and Cultural Rights, supervising the Covenant, has further produced various interpretative materials, such as

General Comments, with regard to Covenant rights, including the right to education. These considerations justify an analysis of the right to education in Part B, as protected in article 13 of the International Covenant on Economic, Social and Cultural Rights.

Part B will consist of five chapters, Chapters 8 to 12. *Chapter 8* will describe the supervisory system provided for under the International Covenant on Economic, Social and Cultural Rights. This takes the form of a system of state reports. States parties must submit reports on the measures taken to realise Covenant rights. The reports must then be analysed by the Committee on Economic, Social and Cultural Rights. The discussion will refer to the activities which the Committee performs, the "jurisprudence" it produces and the legal nature of that "jurisprudence". Information on these aspects must already be provided at the initial stage, as the subsequent chapters will often refer to the Committee's activities and "jurisprudence". *Chapter 9* will address the Covenant's general provisions. Articles 2(1), 2(2) and 4 will be examined. Article 2(1) describes the general nature of state obligations flowing from Covenant rights, article 2(2) guarantees the enjoyment of Covenant rights without discrimination and article 4 provides for, and simultaneously restricts, limitations of Covenant rights. A comprehension of the provisions concerned is necessary to properly understand the nature of the right to education, as protected in article 13 of the Covenant. The discussion in Chapters 8 and 9 will throughout strive to relate the treatment of general matters in these two chapters to the right to education in article 13 Covenant. *Chapter 10* will then analyse article 13 of the Covenant itself. The different aspects of article 13 will be carefully scrutinised. There will be a discussion of the right to education, which article 13(1) first sentence recognises in general terms, of the aims of education as laid down in article 13(1) second and third sentence, of the social aspect of the right to education protected in article 13(2) (*i.e.* the obligation of states parties to realise an education system at the primary, secondary, higher and fundamental levels), and of the freedom aspect of the right to education protected in article 13(3) and (4) (*i.e.* the obligation of states parties to respect the right of parents to choose for their children private schools and to ensure the religious and moral education of their children in conformity with their own convictions, and the obligation of states parties to respect the right of persons to establish and direct private schools). *Chapter 11* will examine the Concluding Observations adopted by the Committee on Economic, Social and Cultural Rights, in as far as they address the right to education in article 13. Concluding Observations are adopted after the consideration of state reports by the Committee and they comment on the extent to which the situation in a particular state party was satisfactory in terms of the realisation of Covenant

rights. They are an important method of clarifying the normative content of Covenant rights. Finally, *Chapter 12* will argue that education needs to be strengthened as a human right by renouncing the human capital approach to education, by restricting free trade in education services and by respecting the right to education in bilateral and multilateral development co-operation activities focusing on education. The chapter will also make suggestions on how to improve the supervision of article 13 under the Covenant. It will be argued that the effectiveness of the system of state reports should be enhanced. At the same time, however, an Optional Protocol to the Covenant should be adopted, providing for individual and group complaints in relation to Covenant rights, to be considered by the Committee on Economic, Social and Cultural Rights. The Committee would be assigned the task of identifying "violations" of Covenant rights, including "violations" of article 13.

PART A

A GENERAL ANALYSIS OF THE PROTECTION OF THE RIGHT TO EDUCATION BY INTERNATIONAL LAW

Before embarking upon a systematic analysis of the right to education, as guaranteed in article 13 of the International Covenant on Economic, Social and Cultural Rights, in Part B of this book, this part, Part A, will undertake a general analysis of the protection of the right to education by international law. It will deal with the various international and regional legal instruments and the legal instruments adopted by UNESCO and the ILO as Specialised Agencies of the UN, protecting the right to education. The discussion in this part will also, by way of introduction, say a few words on the history and nature of the right to education and on the category of economic, social and cultural rights, to which the right to education (also) belongs. The discussion will conclude with a short overview of the activities, *i.e.* international conferences and initiatives, which have been or are currently being undertaken at the international level to promote the right to education.

Part A consists of six chapters, Chapters 2 to 7. *Chapter 2* will make some introductory remarks on the right to education. The topics which will be addressed are the definition of the term "education", the historical development of the right to education, the philosophical basis of the right, the right to education as an empowerment right, the compulsory nature of primary education, the universality of the right to education, its classification, and the right to education as part of customary law. The next chapter, *Chapter 3*, will deal with the category of economic, social and cultural rights, to which the right to education (also) belongs. Economic, social and cultural rights are sometimes considered to differ fundamentally from civil and political rights, as a consequence of the fact that, so it is argued, the realisation of the former costs money but that of the latter not. It is held that as a result of the differences, the two categories of rights must be applied and protected differently. As will be seen, this view, in effect, regards economic, social and cultural rights as second-rate human rights. At other times, economic, social and cultural rights are, unlike civil and political rights, considered to be neither judicially enforceable nor describable in terms of law. Based on this view, treaty provisions protecting civil and political rights are seen as legal rights, those protecting economic, social and cultural rights not. Chapter 3 will try to disprove the above arguments against economic, social and cultural rights, and will further present arguments in support of economic, social and cultural rights. This is deemed necessary before any further discussion of the right to education is embarked upon, as the fate of the right to education, as an economic, social and cultural right, hinges on that of economic, social and cultural rights as a category.

Chapters 4, 5 and 6 will provide an overview of the protection of the right to education by instruments of international law. *Chapter 4* will discuss the provisions on the right to education found in instruments prepared at the international level (excluding those found in instruments of the Specialised Agencies of the UN, which will be discussed in Chapter 6). The applicable provisions of the International Bill of Human Rights, *i.e.* article 26 of the Universal Declaration of Human Rights, articles 13 and 14 of the International Covenant on Economic, Social and Cultural Rights and article 18(4) of the International Covenant on Civil and Political Rights, will thus be dealt with. Similarly, articles 28 and 29 of the Convention on the Rights of the Child will be dealt with. Chapter 4 will also mention the provisions on the right to education found in instruments providing protection against discrimination, those addressing the rights of refugee and stateless persons, of internally displaced persons, and of persons caught up in armed conflict, instruments on the rights of migrant workers, those on the rights of disabled persons, on the rights of older persons, on the rights of detained persons, on the rights of minorities and on the rights of indigenous peoples. *Chapter 5* will then discuss the provisions on the right to education contained in instruments prepared at the regional level. Relevant instruments have *inter alia* been prepared in the European, American and African contexts. Amongst others, article 2 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, article 13 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights and article 11 of the African Charter on the Rights and Welfare of the Child will be dealt with. As regards the European Convention on Human Rights, some of the case law of the former European Commission of Human Rights and the European Court of Human Rights, interpreting the right to education, will briefly be mentioned. The chapter which follows, *Chapter 6*, will discuss the provisions on the right to education in instruments adopted by UNESCO and the ILO as Specialised Agencies of the UN. The focus will be on UNESCO's instruments. First of all, some introductory remarks concerning UNESCO will be made. The mandate and organisational structure of UNESCO, the setting of international educational standards by UNESCO and the monitoring of such standards by UNESCO will be addressed. The organisation's system of consultations based on state reports and its complaints procedure will be dealt with. This will then be followed by a discussion of the legal instruments on education which have been adopted by UNESCO and their supervision. The emphasis here will be on the Convention against Discrimination in Education.

The final chapter of Part A, *Chapter 7*, will shortly refer to the activities, *i.e.* international conferences and initiatives, which have been or are

currently being undertaken at the international level to promote the right to education. Two initiatives will be considered in more detail. Firstly, there will be an analysis of the so-called Education for All (EFA) process, which commenced in 1990 with the adoption of the World Declaration on Education for All by the World Conference on Education for All, held at Jomtien, Thailand. Secondly, a few words will be said on the activities of the Special Rapporteur on the Right to Education. This position was created in 1998 by the Commission on Human Rights, the Special Rapporteur's task being to report on and to suggest ways and means of improving the realisation of the right to education.

CHAPTER TWO

HISTORY AND NATURE OF THE RIGHT TO EDUCATION

1. *Introduction*

This chapter will make some introductory remarks on the right to education. First, an attempt will be made to define the term "education". Only once the meaning of this term has been outlined, will it become clearer what it means to say that somebody is the holder of a right to education. This is followed by a short overview of the historical development of the right to education. This concerns developments prior to the proclamation of human rights, including the right to education, at the international level in the Universal Declaration of Human Rights in 1948. A few comments on the philosophical basis of the right to education will then be made. The most important basis must be seen to be man's inherent dignity. The discussion then focuses on the right to education as an empowerment right. Only with the enjoyment of the right to education is it possible to enjoy certain other human rights. This is what the concept of empowerment rights entails. Next the issue will be considered whether it is compatible with the nature of the right to education as a human right to make primary education compulsory as required by international human rights law. Is it consistent with the nature of a right to make its exercise mandatory? The discussion then addresses the question whether the right to education is universally recognised. It will be seen that most human societies recognise the right to education. Recognition does not always live up to international legal standards, though. Thereafter, an attempt will be made to classify the right to education. Is the right to education a civil and political right? Is it a social right? Is it a cultural right? Or is it a solidarity right? As the discussion will reveal, the right to education contains elements of all these categories. The final aspect to be dealt with will be the question whether the right to education forms part of customary law. It will be argued that this can be said with certainty only of the right to free and compulsory primary education and the right not to be discriminated against in the enjoyment of educational rights.

2. *Definition of the Term "Education"*

Education is of fundamental importance. In 1954, the Supreme Court of the United States of America, in the celebrated case of *Brown v. Board of Education of Topeka*,[1] stressed the importance of education by asserting that

> [t]oday, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[2]

These words not only emphasise the importance of education. They also comment on the meaning of the term "education", as understood by the court. The court considers education to constitute a prerequisite for the ability to duly exercise the rights and duties entailed by citizenship. An uneducated person, for example, will be unable to make an informed decision on election day. Likewise, he will not be able to stand for public office. He lacks the ability to effectively participate in the political processes shaping the society in which he lives. Education is also seen to encompass making persons aware of the cultural and spiritual values of their community. It is seen as a process of transmitting those values from one generation to the next. It is further appreciated that education must place at the disposal of every person such knowledge and skills as to enable him to undergo vocational or professional training. Education is perceived as a *sine qua non* for the ability eventually to perform a chosen vocation or profession and, in so doing, to earn a living. Last but not least, the court considers education to be indispensable for a person to be able to face up to the challenges of everyday life. A person must be taught those skills of life which enable him "to adjust normally to his environment".

The term "education" can be defined in various ways. In a wider sense, education means "all activities by which a human group transmits to its descendants a body of knowledge and skills and a moral code which enable

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[1] 347 U.S. 483 (1954).
[2] *Ibidem* at 493.

that group to subsist".[3] Thus understood, education refers to the transmission to a subsequent generation of those skills needed to effectively perform the tasks of daily living, and further to the inculcation of the social, cultural, spiritual and philosophical values of the particular community. This wide meaning has been attributed to the term "education" in article 1(a) of UNESCO's Recommendation concerning Education for International Understanding, Co-operation and Peace and Education relating to Human Rights and Fundamental Freedoms of 1974. This article states that education implies "the entire process of social life by means of which individuals and social groups learn to develop consciously within, and for the benefit of, the national and international communities, the whole of their personal capacities, attitudes, aptitudes and knowledge". In a narrower sense, education means "instruction imparted within a national, provincial or local education system, whether public or private".[4] In this sense, then, education refers to formal institutional instruction. Generally, international instruments use the term in this sense. UNESCO's Convention against Discrimination in Education of 1960, for example, defines education in article 1(2) as "all types and levels of education, [including] access to education, the standard and quality of education, and the conditions under which it is given". The distinction between education in a wide and in a narrow sense has also been drawn by the European Court of Human Rights.[5] The court states:

> [Education in a wider sense refers to] the whole process whereby, in any society, adults endeavour to transmit their beliefs, culture and other values to the young, whereas teaching or instruction [education in a narrower sense] refers in particular to the transmission of knowledge and to intellectual development.[6]

The right to education, as protected in international instruments and as dealt with in this book, refers primarily to education in its narrower sense. Education connotes teaching and instruction in specialised institutions. It means formal teaching or instruction, comprising primary, secondary and higher education.

Two aspects should be noted at this stage. Firstly, international law provides no effective protection of the right to pre-primary education.

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[3] M'Bow, A., "Introduction", in: Mialaret, 1979, p. 11.

[4] *Idem*.

[5] The wide and narrow meanings may be referred to in German and French as "*Bildung*"—"*Ausbildung*" and "*culture générale*"—"*éducation/instruction*", respectively. See Delbrück, 1992, p. 94.

[6] *Campbell and Cosans v. United Kingdom*, Judgement of 25 February 1982, Publications of the European Court of Human Rights, Series A, Vol. 48, para. 33.

International documents generally omit reference to education at the pre-primary level. It has correctly been stated that "[t]his is an unfortunate omission as the opportunity to participate in pre-school education has been recognised as important because children's attitudes for example on race are often formed in the pre-school years".[7] Secondly, the right to education accrues to all individuals. Although children are the main beneficiaries, the right also accrues to adults. The Universal Declaration of Human Rights of 1948, in proclaiming in article 26(1) that "[e]verybody has the right to education", clearly acknowledges this fact.[8]

Education, it should be emphasised, is an interactive process. It involves learning. Merely attending educational institutions, without learning anything, does not amount to education. The right to education must therefore be understood in the sense of a right *to be educated*.[9] The question arises, what core knowledge or skills may be considered to constitute education. This concerns the issue of the content of education. International law does not prescribe specific syllabi. It must, accordingly, be accepted that the content of education may quite legitimately differ between different types of society.[10] Hence, although education must involve the acquisition of knowledge and skills, there are no internationally agreed upon criteria as to the specific knowledge and skills to be acquired.[11]

These days, education is an important public function. The state is seen as the chief provider of education. The state allocates substantial budgetary resources to the education system and regulates the provision of education. The pre-eminent role of the state is clearly recognised in international documents. Where article 13 of the International Covenant on Economic, Social and Cultural Rights of 1966 states that states parties to

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[7] Van Bueren, 1995, p. 234.

[8] In the case of children, it should be noted, however—as has been stated by Katarina Tomaševski, former Special Rapporteur of the Commission on Human Rights on the Right to Education—that "[a]lthough the child is today treated as the principal subject of the right to education, the child is not party to decision-making on the realisation of the right to education. International human rights law divides decision-making between the parents and the State. Each principal actor can—and routinely does—claim to represent the best interest of the child. The child's right to education is reflected in the duty of the parents, community and the State to educate the child as well as the duty of children to educate themselves". See Tomaševski, 1999a, para. 79 (UN Doc. E/CN.4/1999/49). On the exact nature of the relationship between the child's right to education, parental rights concerning their children's education and the role of the state in education, see 10.5.1.3.6. *infra*.

[9] Lonbay, 1988, pp. 17–18.

[10] *Ibidem* at pp. 44–45.

[11] This statement is subject to the qualification that education must fulfil certain aims. These are laid down in international legal instruments. See, for example, art. 26(2) of the Universal Declaration of Human Rights of 1948 in terms of which education must *inter alia* be directed to the full development of the human personality.

the Covenant recognise that, with a view to achieving the full realisation of the right to education, primary, secondary, higher and fundamental education and a system of schools must be provided, the duty to so provide squarely falls on the state. However, not only the state bears responsibility for the education of children. Traditionally, education has been the duty of the child's parents. In modern times, with the rise of systems of education, the role of parents has diminished. It remains important, though, in the context of determining the type and content of education the child will receive.[12] This is justified, on the one hand, by the important status of the family and the closeness of the parent/child relationship in most, if not all, human societies and, on the other hand, by the desirability of a pluralistic democratic society, the existence of which would be jeopardised by a state monopoly on education.[13] It is, moreover, increasingly recognised that non-governmental and other sectors bear some form of responsibility in the sphere of education. Article 7 of the World Declaration on Education for All, adopted by the World Conference on Education for All, held at Jomtien, Thailand from 5 to 9 March 1990, states that "[n]ew and revitalised partnerships at all levels [are] necessary . . . [including] . . . partnerships between government and non-governmental organisations, the private sector, local communities, religious groups, and families".

3. *Historical Development of the Right to Education*

Prior to the Age of Enlightenment of the eighteenth and nineteenth centuries, education was the responsibility of parents and the church.[14] Only with the French and American Revolutions did education establish itself also as a public function.[15] It was realised that the state, by assuming a more active role in the sphere of education, could promote the ideal of education being available and accessible to all. "Public education was perceived as a means of realising the egalitarian ideals upon which these revolutions

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[12] Voeltzel, R., "Religion and the question of rights: Philosophical and legal problems in European tradition", in: *World Yearbook of Education*, 1966, p. 218 remarks, "It must, however, be recognised that such a right [to education] has no meaning unless at the same time it is stated who can and must decide what education shall be . . . Not only Europe but all mankind has urged that this is the right of the parents and this may be regarded as the hallowing of a principle of 'natural right' which is admitted instinctively by the whole human race".

[13] On the issue of state and parents' responsibility for the child's education, see Lonbay, 1988, pp. 38–44.

[14] Nowak, 1995b, p. 191.

[15] Hodgson, 1998, p. 8.

were based . . .".[16] Previously, education had been the prerogative of the upper social classes.

The classical human rights instruments of this time, such as the English Bill of Rights of 1689, the American Declaration of Independence of 1776 and the French Declaration of the Rights of Man of 1789 did not protect the right to education, however. These instruments focused on civil and political rights, like freedom from arbitrary arrest, freedom of expression, freedom of religion, the right to life and security of the person, the right to property, equality and the right to vote. The *laissez-faire* spirit of the period permeated these instruments. The state was seen as a potential threat to individual liberty and for that reason had to withhold itself as far as possible from interfering in the affairs of civil society. A right to education and a concomitant obligation on the part of the state to provide such education did not fit in this scheme of things.[17]

The liberal concept of human rights of the nineteenth century envisaged that parents retained the primary duty to give their children adequate education. The state's obligation was to ensure that parents complied with their obligations. To this end, many states enacted legislation making school attendance compulsory. Child labour laws were enacted to restrict the number of hours per day during which children could be employed and so to ensure that children would go to school. States became involved in the legal regulation of curricula and laid down minimum educational standards. The state's duty to directly provide education remained subsidiary, however.[18] John Stuart Mill in his famous treatise *On Liberty* remarked that "[a]n education established and controlled by the State should only exist, if it exists at all, as one among many competing experiments, carried on for the purpose of example and stimulus to keep the others up to a certain standard of excellence".[19] Nineteenth century liberal thought entailed an awareness of the danger of too much state involvement in the sphere of education. Even so, it relied on state intervention to reduce the dominance of the church and to protect the rights of children against their own parents.[20]

During the latter half of the nineteenth century, educational rights found their way into domestic bills of rights. Provisions on educational rights, like other fundamental rights provisions, reflected liberal ideas on human rights.

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[16] *Idem.*

[17] *Ibidem* at pp. 8–9.

[18] For a discussion of liberal thought and its perception of education, see Nowak, 1995b, pp. 191–192 and Hodgson, 1998, pp. 8–10.

[19] J. S. Mill, *On Liberty*, quoted in Nowak, 1995b, p. 192.

[20] Nowak, 1995b, p. 191.

This may be exemplified by referring to a document which exerted a strong influence on further constitutional development in Europe, the Constitution of the German Empire of 1849, better known as the "*Paulskirchenverfassung*". Articles 152 to 158, forming part of the Constitution's bill of rights, were devoted to education. They aimed at striking a fair balance between children, parents, the church, the state and those who operated educational institutions. Education was recognised as a function of the state, independent of the church. Quite remarkably, the poor were proclaimed to have a right to free education. The state was not explicitly required, however, to set up educational institutions. Rather, the Constitution protected the rights of citizens to found and operate schools and to give home instruction, it provided for freedom of science and teaching and it guaranteed the right of everybody to choose his vocation and train for it.[21]

The nineteenth century was also the time when Karl Marx and Friedrich Engels expounded their views on socialism. Socialist theory perceived the state as a beneficial institution whose principal task it was to ensure the economic and social well-being of the community through positive governmental intervention and regulation. The individual was recognised to have claims to basic welfare services against the state. Education was viewed as one of the individual's welfare entitlements. Liberalism, as has been seen, regarded private actors as the prime providers of education. The socialist concept of human rights shifted the primary responsibility of providing education to the state. Socialist ideas came to fruition in the wake of the Russian Revolution of 1917. Article 121 of the Soviet Constitution of 1936 was the first provision in a constitution which *expressis verbis* recognised a right to receive education with a corresponding obligation of the state to provide such education. It guaranteed free and compulsory education at all levels, a system of state scholarships and a system of vocational training in state enterprises. Together with the right to work and the right to social security, the right to education features as a prominent right in the constitutions of socialist states.[22]

As is demonstrated by more recent history, socialism on the whole has not been a successful social or state theory. This notwithstanding, credit also goes to socialist theory that education today is held to be, first and foremost, the responsibility of the state. These days, the state sets up and maintains a system of schools, makes primary education compulsory and free, restricts child labour, becomes involved in the legal regulation of curricula and lays down minimum educational standards. Yet, at the

[21] Nowak, 1995b, p. 191 and Hodgson, 1998, pp. 9–10.

[22] For a discussion of socialist thought and its perception of education, see Nowak, 1995b, p. 192 and Hodgson, 1998, p. 9 and p. 11.

same time, the state guarantees the right of parents to establish and direct private schools, if they so wish. Parents may further choose which school their child should go to and may ensure the education of their children in accordance with their own religious and philosophical convictions. Granted, liberal democracies are reluctant to speak of a right to education in the sense of education as a social entitlement enforceable against the state. And, communist states, generally, do not uphold the liberal notion of parents' rights as regards the education of their children. This does not detract from the fact, however, that the contemporary state, whether of socialist, social welfare or liberal inclination, appreciates that the provision of education is primarily its obligation and, further, that it should, strictly speaking, respect parental rights.

Many states protect the right to education in their constitutions. Some do so in the form of a fundamental right, enforceable at law, others do so in the form of a "directive principle of state policy", which constitutionally obliges the government but is unenforceable. There are also states whose constitutions do not afford explicit recognition to the right to education. But, even in these instances, education is seen as a vitally important public function. In 1973, the Supreme Court of the United States of America, in the case of *San Antonio Independent School District v. Rodriguez*,[23] held that the right to education was not a fundamental constitutional right. Nine years later, in 1982, in the case of *Plyler v. Doe*,[24] the same court commented as follows on the right to education:

> Public education is not a "right" granted to individuals by the Constitution. But neither is it merely some governmental "benefit" indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction . . . The American people have always regarded education and [t]he acquisition of knowledge as matters of supreme importance. We have recognised the public schools as a most vital civic institution for the preservation of a democratic system of government, and as the primary vehicle for transmitting the values on which our society rests . . . In addition, education provides the basic tools by which individuals might lead productive lives to the benefit of us all. In sum, education has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.[25]

At the international level, educational rights were protected, for the first time, in a series of minority treaties, concluded after the First World War

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[23] 411 U.S. 1 (1973).
[24] 457 U.S. 202 (1982).
[25] *Ibidem* at 221.

under the auspices of the League of Nations.[26] The treaties were concluded as an adjunct to the peace treaties between the Allied and Associated Powers and the defeated nations. These agreements sought to safeguard the religious, linguistic and educational rights of certain minorities in post-war Europe where many national boundaries had been redrawn. The first such treaty was the Treaty between the Principal Allied and Associated Powers and Poland signed on 28 June 1919,[27] which in many ways had served as a prototype for the agreements that would follow. Article 8 of the treaty protected the right of Polish nationals belonging to racial, religious or linguistic minorities to establish, manage and control at their own expense schools, "with the right to use their own language and to exercise their religion freely therein". Article 9 obliged the Polish state to provide ". . . in the public educational system in towns and districts in which a considerable proportion of Polish nationals of other than Polish speech are residents adequate facilities for ensuring that in the primary schools the instruction shall be given to children of such Polish nationals through the medium of their own language. . . .". The topic of the post-World War I minority treaties and their protection of educational rights is dealt with more fully in a subsequent Chapter.[28]

In 1924, the League of Nations adopted the Declaration of the Rights of the Child, also known as the "Declaration of Geneva".[29] The Declaration was in the nature of a Charter of Child Welfare. The Declaration did not expressly recognise the right to education. Such a right was implied, however, in three of its five operative principles. Principle I stated, "The child must be given the means requisite for its normal development . . .", Principle II stated, ". . . the child that is backward must be helped . . ." and Principle IV stated, "The child must be put in a position to earn a livelihood . . .". The Declaration represented the first step towards the development of general international norms for the protection of the child. Earlier instruments had focused on particular problems concerning children, such as child labour. The Declaration's five basic principles formed the foundation of the Declaration of the Rights of the Child of 1959, which set out more detailed standards. No legal obligations were imposed on League members by the Declaration. The instrument was an aspirational document, imposing moral duties. Members were to be guided in their child welfare efforts by the principles of the Declaration.

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[26] See Hodgson, 1998, p. 10. For a thorough treatment of the post-World War I minority treaties and their protection of educational rights, see Lonbay, 1988, pp. 75–134.

[27] 112 Great Britain Treaty Series 232.

[28] See 9.3.3.3.3.1. *infra.*

[29] For information on the Declaration, see Hodgson, 1992, pp. 260–261 and Hodgson, 1998, pp. 10–11.

4. *Philosophical Basis of the Right to Education*

Several rationales can be invoked to support the argument that education should be recognised as a fundamental human right.[30]

Firstly, there is *the social utilitarian argument.* The emphasis here is on the importance of education for society. The Supreme Court of the United States of America in the case of *Brown v. Board of Education*,[31] as has been seen above,[32] stressed the importance of education for the performance of public responsibilities and for the due exercise of citizen rights. A minimum level of competence is considered to be required to effectively exercise one's right to vote and to participate in political activity in a meaningful way. A well-educated citizenry is seen as critical for the maintenance of democratic structures and ideals. Education is further held to be the primary means for transmitting the values of society to the next generation. The words of the US Supreme Court in *Plyler v. Doe*[33] that "[w]e have recognised the public schools as a most vital civic institution for the preservation of a democratic system of government, and as the primary vehicle for transmitting the values on which our society rests",[34] capture the essence of the social utilitarian approach.

A second rationale is *the argument that education is a prerequisite for individual development.* The consideration is that without education the individual is unable to develop as a person and to realise his potential. Many international human rights instruments refer to this role of education. Article 26(2) of the Universal Declaration of Human Rights of 1948 requires that "[e]ducation shall be directed to the full development of the human personality . . .". Article 29(1)(a) of the Convention on the Rights of the Child of 1989 lays down, in more specific terms, that ". . . the education of the child shall be directed to [t]he development of the child's personality, talents and mental and physical abilities to their fullest potential . . .". In terms of this approach, education should be recognised as a fundamental human right as only education makes it possible to realise one's abilities.

A third rationale is *the individual welfare argument.* Here it is argued that the individual should have a right to such welfare necessities provided by the community at large which he is unable to provide by himself. It is

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[30] The following discussion of the rationales, supporting the argument that education should be recognised as a fundamental human right, is broadly based on Hodgson, 1998, pp. 17–20.

[31] 347 U.S. 483 (1954).

[32] See 2.2. *supra.*

[33] 457 U.S. 202 (1982).

[34] *Ibidem* at 221.

held that education is a welfare necessity which the individual cannot provide by himself. He should, therefore, be accorded a claim to receive education as, otherwise, he would suffer a significant and enduring disability. He should be assisted to achieve such a standard of literacy and numeracy to enable him to function effectively in his community. Education should place the individual in a position to secure employment and thereby to satisfy his personal needs, such as food or shelter.

The above arguments all in some measure provide a basis for the recognition of education as a fundamental human right. In this writer's view, however, the most important foundation for a human right to education must be seen to be *man's inherent dignity*.[35] Human dignity should be recognised as the basis of human rights. Education should be seen as a requirement of human dignity and should, therefore, be recognised as a human right. It may be contended that human dignity, as a metaphysical notion, cannot properly serve to vindicate a right's status as a human right. Human dignity is seen by some as nothing more than a prejudicial assumption. The fact remains, nevertheless, that the notion of human dignity is today accepted to constitute the moral basis of human rights. The first preambular paragraph of the Universal Declaration of Human Rights of 1948 holds that "[w]hereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, . . . the General Assembly proclaims [the] Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations . . .".[36] Article 26 of the Declaration then goes on to proclaim a human right to education. In effect, recognition of human dignity is seen to require recognition of a human right to education. The International Covenant on Economic, Social and Cultural Rights of 1966, in article 13, establishes the link between education and dignity quite clearly. Article 13(1) stipulates that ". . . education shall be directed to the full development of the human personality and the sense of its dignity . . .". Accordingly, the Covenant views education

[35] This is also the view of Lonbay, 1988, pp. 27–34. At p. 28, Lonbay states that "[t]he basis of the universal morality of the right to education can be said to lie in the fundamental idea that the individual is entitled to respect for his own sake". Similarly, see the view of Delbrück, 1992, pp. 98–99, who, at p. 99, states that "it can be safely concluded that the human personality inherent in human dignity forms the basis of all aspects and implications of the right to education and as such has to be taken into account in determining the meaning and scope of the right, especially with regard to the role of the State in the process of implementing the right to education".

[36] Both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights of 1966 recognise in their second preambular paragraph that the rights respectively protected ". . . derive from the inherent dignity of the human person . . .".

as a prerequisite for a dignified existence. Education that makes available knowledge and skills and trains the individual in logical thought and reasoned analysis is seen as a requirement of dignity. Hence, human dignity should be perceived as the ultimate reason for recognising education as a human right.

5. *The Right to Education as an Empowerment Right*

The right to education may be described as an empowerment right.[37] This designation originates with Jack Donnelly and Rhoda Howard who distinguish between "survival rights", "membership rights", "protection rights" and "empowerment rights".[38] "Survival rights", such as the rights to life, food and health care, are said to guarantee individual existence. "Membership rights" are held to assure to the individual an equal place in society. Family rights and the prohibition of discrimination are mentioned as examples. "Protection rights", it is stated, protect the individual against abuses of power by the state. The rights to *habeas corpus* and an independent judiciary are cited as examples. Of "empowerment rights", finally, it is stated that they "provide the individual with control over the course of his or her life, and in particular, control over (not merely protection against) the state".[39] Examples are the right to a free press, freedom of association and the right to education.[40] People must not only be protected against attacks by the state, they must also be empowered to determine the shape and direction of their life. Empowerment rights make it possible for the individual to take charge of his life. They facilitate participation in political, economic, social and cultural life. Empowerment rights may be said to be a prerequisite for the exercise of other human rights.

The right to education is an empowerment right for various reasons. Education has an enormous liberating potential.[41] Educational institutions are often used as a means of social control, of enforcing intellectual conformity, rather than as a mechanism for fostering creativity and autonomy and promoting personal liberation. Nonetheless, "no matter how controlled the curriculum, the skills developed in educational institutions can be applied

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[37] On the nature of the right to education as an empowerment right, see Lonbay, 1988, pp. 34–35 (who speaks of education as a "core" human right), Coomans, 1992, pp. 270–272, Coomans, 1995, pp. 11–12, Nowak, 1995b, p. 189, Mehedi, 1999b, paras. 1–4 (UN Doc. E/CN.4/Sub.2/1999/10) and Tomaševski, 2001a, paras. 11–14 (UN Doc. E/CN.4/2001/52).

[38] See Donnelly and Howard, 1988, pp. 214–248.

[39] *Ibidem* at p. 215.

[40] *Ibidem* at pp. 214–215.

[41] On the liberating potential of education, see Donnelly and Howard, 1988, p. 235.

to the development of ideas other than those sanctioned by the state".[42] This is borne out by the substantial representation of well-educated persons among political dissidents in many states of the world. Education, therefore, enables the individual to think critically about life. It enables him to examine seriously possible courses of action and to make rational choices based on such examination.

Education also stands for political empowerment.[43] Freedom of information, expression, assembly and association and the right to vote and to be elected depend on a minimum level of education. Only those who can be informed, who can express their ideas and who can assemble to articulate their concerns are in a position to take part in political life. Similarly, only an educated person can make an informed decision and duly exercise his right to vote or stand for political office. It has been stated that "for this reason, well-educated and critical citizens can be a threat to a regime which suppresses its own people. Therefore, some governments neither feel obliged nor interested to invest much money and effort in education".[44]

Moreover, education is the key to socio-economic development.[45] Education promotes the realisation of economic and social human rights. The right to food may serve as an example. People may be taught how to secure their own food supply. But, also other such rights come to mind, for example, the right to work, the right to an adequate standard of living or the right to health. These rights can only be exercised in a meaningful manner where a minimum level of education has been attained. Ultimately, it is the individual who has been taught how to read and write who can acquire the knowledge and skills necessary to satisfy his and his family's basic needs. Education facilitates economic and social integration. Only literate persons can properly participate in economic life and take full advantage of the opportunities it offers. And, in virtually all countries, education is "one of the few ways for a poor child to move rapidly up the social ladder".[46]

Finally, education increases the opportunities to take part in cultural

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[42] *Idem*.

[43] On education and political empowerment, see Donnelly and Howard, 1988, p. 235 and Coomans, 1992, pp. 271–272.

[44] Coomans, 1992, pp. 271–272. Own translation from original Dutch text, "Zo kunnen goed opgeleide en mondige burgers een bedreiging vormen voor een regime dat de eigen bevolking onderdrukt. Daarom hebben sommige regimes er geen behoefte aan noch belang bij om veel geld en aandacht te besteden aan onderwijs".

[45] On education and socio-economic empowerment, see Donnelly and Howard, 1988, p. 236 and Coomans, 1992, p. 272.

[46] Donnelly and Howard, 1988, p. 236.

life.[47] The right to take part in cultural life is protected in article 15 of the International Covenant on Economic, Social and Cultural Rights of 1966. The link between educational and cultural rights is very close. To a considerable extent, the measure of realisation of the right to education reflects the status of the enjoyment of cultural rights. For religious, linguistic and ethnic minorities, education is the most important means to preserve their cultural identity.

The Committee on Economic, Social and Cultural Rights, which is responsible for the supervision of the International Covenant on Economic, Social and Cultural Rights, has confirmed the above observations on the nature of the right to education, commenting as follows:

> Education is both a human right in itself and an indispensable means of realising other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalised adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognised as one of the best financial investments States can make. But the importance of education is not just practical: a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence.[48]

It may be concluded that realising the right to education promotes other human rights simultaneously. The enjoyment of many civil and political as well as economic, social and cultural rights is greatly facilitated by the protection of the right to education. In this way, the right to education accentuates the interdependence and indivisibility of all human rights.

6. *The Right to Education and Compulsory School Attendance*

Today, education is compulsory up to a certain age in most countries. Compulsory education constitutes a fundamental tenet of international human rights law. Article 13(2)(a) of the International Covenant on Economic, Social and Cultural Rights of 1966 states, for example, that ". . . [p]rimary education shall be compulsory and available free to all . . .". It has been argued by certain writers on human rights that the right to education can-

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[47] On education and cultural empowerment, see Donnelly and Howard, 1988, p. 236 and Coomans, 1992, p. 272.

[48] CESCR, General Comment No. 13 (Twenty-First Session, 1999) [UN Doc. E/2000/22] The right to education (art. 13 ICESCR) [*Compilation*, 2004, pp. 71–86], para. 1.

not be considered an inalienable human right as its exercise, at least at the primary level, has become compulsory. The compulsory nature of education is said to be irreconcilable with the classical notion of human rights in terms of which the freedom to refuse to exercise a right must be maintained at all times. Kühnhardt has stated:

> Compulsory education must either be seen as a violation of the human right to education, as it makes education an instrument of coercion, or it must be freed of its particular moral significance, by no longer having recourse to it for human rights ideals and by no longer postulating the need for education as a human right.[49]

Nonetheless, compulsory education *can* be reconciled with education as a human right. Making school attendance compulsory is a way of guaranteeing that nobody can withhold children from going to school. The term "compulsory" really means "a protection of the rights of the child, who may claim certain rights that nobody, neither the State nor even the parents, may deny".[50] Compulsory schooling is intended to protect the child's interests against negative influences of its parents, the family or the state. As has been stated above, education is vitally important for the full development of the child's personality and to empower the child to exercise all its human rights. A further argument is that mandatory school attendance promotes an essential principle of human rights law, the principle of equal opportunities. Compulsory schooling goes to ensure that everybody has equal chances in further education and in society. To this, one may add the argument that the child, when it is young, needs to be protected against itself. By making education compulsory, the state and the child's parents are obliged to see to it that the child receives instruction. They have a duty to act in the child's best interests and to protect it against its own immaturity.[51]

It needs to be pointed out that compulsory school attendance in no way implies an educational monopoly of the state. Article 26(3) of the Universal

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[49] Kühnhardt, L., *Die Universalität der Menschenrechte: Studie zur ideengeschichtlichen Bestimmung eines politischen Schlüsselbegriffs*, Munich, 1987, p. 340. Own translation from original German text, "Entweder muss, . . ., die Schulpflicht als eine Verletzung des Menschenrechts auf Bildung angesehen werden, da sie Bildung zu einem Zwangsinstrument erklärt, oder aber die Schulpflicht wird von ihrer besonderen moralischen Bedeutung befreit, indem sie nicht länger für Menschenrechtsideale in Anspruch genommen und das Bildungsbedürfnis nicht länger als Menschenrecht postuliert wird".

[50] Mehedi, 1999b, para. 59 (UN Doc. E/CN.4/Sub.2/1999/10).

[51] See Coomans, 1992, pp. 269–270. Lonbay, 1988, pp. 34–37 argues that H. Hart's "will theory of rights", in terms of which one can only speak of a right if there is an element of choice in the exercise of it, needs to be modified so as not to "effectively rule out the possibility of there being a right to education for one of the most important categories of potential beneficiaries [*i.e.* children]" (p. 36).

Declaration of Human Rights of 1948 states quite clearly that "[p]arents have a prior right to choose the kind of education that shall be given to their children". Parents retain their right to ensure their children's education in conformity with their own religious and philosophical convictions. Parents must have the opportunity of choosing between state and private schools. Moreover, in state schools, the state must guarantee pluralism. Public education must be free from state indoctrination. And, where instruction conflicts with parents' religious and philosophical convictions, dispensation from classes must be possible in certain cases. At the same time, however, compulsory school attendance entails that the state may stipulate quality requirements with which education in private schools or at home must comply.[52]

7. *The Universality of the Right to Education*

Fons Coomans has developed a very useful scheme for analysing whether the right to education can make claim to universality.[53] On the one hand, he distinguishes between universal validity and universal acceptance of the right to education. On the other, he differentiates between formal universality and material universality of the right to education.

Firstly, the universal validity and universal acceptance of the right to education will be considered. The issue of *the universal validity of the right to education* concerns the question whether the right to education, once recognised, applies to each and every person.[54] Is the right's nature such that everybody potentially derives benefit from its recognition? The right to education (also) belongs to the category of economic, social and cultural rights. These rights guarantee an adequate standard of living. They stress the quality of life. Thus considered, everyone has a right to education. This finding is supported by international instruments which protect the right to education. Article 13(1) of the International Covenant on Economic, Social and Cultural Rights of 1966, for instance, states that "[t]he States Parties to the present Covenant recognise the right of *everyone* to education".[55] The same idea is expressed in a declaration on adult education:

> [The right to education] is a fundamental human right whose legitimacy is universal: the right to learn cannot be confined to one section of humanity; it must not be the exclusive privilege of men, or of the industrialised coun-

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[52] Coomans, 1992, p. 270.
[53] See the discussion of Coomans, 1992, pp. 258–268.
[54] See *ibidem* at pp. 259–260.
[55] Author's italics.

> tries, or the wealthy classes, or those young people fortunate enough to receive schooling.[56]

The issue of *the universal acceptance of the right to education* concerns the question whether the value of the right to education is accepted by all political, social, religious and cultural communities.[57] The inquiry relates to whether all communities support the individual's claim to be educated.

Generally, Western states regard the right to education as an important entitlement of the individual.[58] The right to education is protected in the constitutions of many of these countries. Moreover, the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), in article 2 of its First Protocol of 1952 states that "[n]o person shall be denied the right to education".[59]

African communities perceive education as a group function.[60] Family, village and tribe take part in educating children. The child's education is directed to its role as a responsible member of the group. Apart from local communities, national governments play a central role in education. Governments accept the value of education. However, education has a collective character. It is not regarded as an individual right. Education is viewed as an instrument for promoting economic development. It is seen as a means for eradicating illiteracy and for advancing nation-building. In consequence, the state exercises substantial influence in the sphere of education. A tendency to monopolise education is discernible. Far-reaching controls exist with regard to private educational institutions.[61] It should be mentioned though that article 17 of the African Charter on Human and Peoples' Rights of 1981 recognises in a summary fashion that "[e]very individual shall have the right to education".

The Islamic faith considers the right to education to be a basic right

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[56] Recommendations of the Fourth International Conference on Adult Education, held at Paris, France from 19–29 March 1985. See UNESCO Doc. ED/MD/81, p. 67.

[57] See Coomans, 1992, pp. 260–265. *Universal acceptance* must not be mistaken for *uniformity*. Diversity is inherent in the notion of universal acceptance of the right to education. National education systems must be adapted to particular geographical, social and cultural circumstances. Only then is universal acceptance possible in the first place.

[58] See Coomans, 1992, p. 260.

[59] The Western approach has to a large extent been copied in other democratic states, such as those of Latin America, India or Japan. The former communist states of Eastern Europe also purport to follow this approach.

[60] See Coomans, 1992, pp. 260–261.

[61] A similar approach is adopted in many Southeast Asian states. In many states belonging to the Association of Southeast Asian Nations (ASEAN) (Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam), governments accept the value of education, but do not regard it as an individual right but rather as a means of promoting economic development. No regional human rights mechanism exists with regard to the area concerned, so far.

which is important for the exercise of other rights.[62] Education should transmit such knowledge and skills as are required to live in accordance with the principles of the Islamic teachings and to perform the tasks of daily life. Article XXI of the non-binding Universal Islamic Declaration of Human Rights of 1981, for example, states in paragraph (a) that "[e]very person is entitled to receive education in accordance with his natural capabilities" and in paragraph (b) that "[e]very person is entitled to a free choice of profession and career and to the opportunity for the full development of his natural endowments". Islam further guarantees equality between men and women in the exercise of the right to education. Equality, however, means equality in consonance with Islamic principles. These accord women a subordinate position in society. In effect, therefore, women enjoy neither equal opportunity nor equal treatment in the field of education. A clear conflict exists with article 10 of the International Convention on the Elimination of All Forms of Discrimination against Women of 1979 which guarantees to women equal access to and quality of education. In Islamic states, there is further no clear separation between state and religion. The state seeks to enforce Islamic education in state schools. It comes as no surprise, therefore, that private schools were abolished in Iraq and Iran in 1975 and 1979, respectively.

Socialist states attach central importance to the right to education.[63] It has been stated that the right to education (also) belongs to the category of economic, social and cultural rights. Socialist states consider these rights pivotal in systematically realising a socialist society. The education system of communist states is based on Marxist-Leninist ideology. One can speak of ideological indoctrination. Additionally, education is strongly anti-religious and atheistic in nature. The state has a monopoly on education. Private schools are forbidden. Parents are not allowed to establish and direct educational institutions. There is no pluralism in education. It is quite evident, therefore, that socialist states do not protect the freedom of education. At the most, they pay lip service to this important principle of international human rights law.

It may be concluded that the right to education finds considerable acceptance in different political, social, religious and cultural communities. It is generally appreciated that education is vitally important for the development of the individual and that of society. States are aware that education is essentially their responsibility. It has to be noted, however, that freedom of education is not (yet) fully accepted in many African, Islamic and socialist states.

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[62] See Coomans, 1992, pp. 261–262.
[63] See *ibidem* at pp. 262–264.

Now, the formal and material universality of the right to education will be considered. *Formal universality* concerns the question whether the right to education is officially recognised by states.[64] Proper indications are, amongst others, the state of ratification of the International Covenant on Economic, Social and Cultural Rights of 1966 and other international agreements protecting the right to education and also the fact of membership of the United Nations Educational, Scientific and Cultural Organisation (UNESCO).

The International Covenant on Economic, Social and Cultural Rights of 1966, which protects the right to education in its articles 13 and 14, has been ratified by 151 out of a possible 194 states.[65] This constitutes 78 per cent of the community of states. This is an impressive record. It should be mentioned though that the Covenant has not been ratified by the United States of America.[66] It is important, furthermore, that states from all parts of the world, representing different economic, social and cultural systems, have ratified the treaty. Reservations to article 13 are few. Reservations have been expressed by Algeria, Barbados, India, Ireland, Japan, Madagascar and Zambia.[67]

Moreover, virtually all states are members of UNESCO and may, therefore, be said to endorse its purposes.[68] One of UNESCO's purposes is to realise educational opportunities for all and to promote equal chances and treatment in education.[69] In practice, much of UNESCO's activities are directed at achieving primary education for all children and at eradicating adult illiteracy. UNESCO's Convention against Discrimination in Education of 1960 has been ratified by 90 states.[70]

In view of these realities, it may be agreed with Coomans that "there can be little doubt that the formal acceptance of the right to education by a large proportion of the community of states is a fact".[71]

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[64] See *ibidem* at pp. 265–266.

[65] Status of ratifications as of 24 November 2004. See the website of the Office of the UNHCHR (www.ohchr.org).

[66] The Convention on the Rights of the Child of 1989, which protects the right to education in its arts. 28 and 29, has been ratified by an impressive 192 states (99% of states). Only the United States of America and Somalia have not ratified it. Status of ratifications as of 24 November 2004. See the website of the Office of the UNHCHR (www.ohchr.org).

[67] See "Status of the International Covenant on Economic, Social and Cultural Rights and reservations, withdrawals, declarations and objections under the Covenant", as at 1 October 2001, UN Doc. E/C.12/1993/3/Rev.6.

[68] Information available on the website of UNESCO (www.unesco.org) on 28 December 2004 shows that the organisation has 190 members.

[69] Art. 1(2) of the Constitution of UNESCO.

[70] This figure is shown on the website of UNESCO (www.unesco.org) on 28 December 2004.

[71] Coomans, 1992, p. 266. Own translation from original Dutch text, "Er kan . . . weinig twijfel over bestaan dat de formele aanvaarding van het recht op onderwijs door een groot deel van de gemeenschap van staten een feit is".

Material universality concerns the question whether the right to education is factually realised in the states of the world.[72] Has the right to education been implemented in practice on a global scale? It has been said that the state bears the primary obligation for realising the right to education.[73] It is required to take steps, to the maximum of its available resources, towards progressively implementing the right to education.[74] Many states fail in this regard. Governments, not only in the third world, cut budgetary expenses on education with the result that the costs have to be borne by parents and students. Child labour continues to exist in many countries. Children seek employment to contribute to an otherwise too meagre family income. Such children attend school irregularly or not at all. In some states, primary schools cannot be maintained because qualified teachers are lacking. Active discrimination in education on the basis of sex, language and religion continues to be practiced in some countries. Women and members of minorities are particularly affected by such discrimination. Likewise, static discrimination remains a problem. Certain social groups, for instance lower income classes, are underrepresented in various national education systems. It has also been pointed out that freedom of education has not been realised in many African, Islamic and socialist states.[75]

Material universality of the right to education has, as yet, not been achieved. Granted, progress in implementing the right to education is noticeable in some states. Even so, the right to education remains a hollow phrase for people in many other states. Point 5 of the Dakar Framework for Action, adopted by the World Education Forum, held at Dakar, Senegal from 26 to 28 April 2000 may be cited at this juncture:

> The [Education for All] 2000 Assessment demonstrates that there has been significant progress in many countries. But it is unacceptable in the year 2000 that more than 113 million children have no access to primary education, 880 million adults are illiterate, gender discrimination continues to permeate education systems, and the quality of learning and the acquisition of human values and skills fall far short of the aspirations and needs of individuals and societies . . .

It may be stated, in conclusion, "that material realisation of the right to education in many respects still leaves much to be desired".[76]

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[72] See *ibidem* at pp. 267–268.

[73] See 2.3. *supra.*

[74] Art. 13 read in conjunction with art. 2(1) of the International Covenant on Economic, Social and Cultural Rights.

[75] See Coomans, 1992, pp. 267–268.

[76] *Ibidem* at p. 268. Own translation from original Dutch text, ". . . dat de materiële verwezenlijking van het recht op onderwijs op verschillende punten nog veel te wensen overlaat".

8. *Classification of the Right to Education*

Modern human rights terminology usually distinguishes between three generations of human rights. Civil and political rights represent the first, economic, social and cultural rights the second and solidarity rights the third generation of human rights.[77]

Civil and political rights are the product of the Age of Enlightenment of the eighteenth and nineteenth centuries. They have been formulated in historical documents, such as the American Declaration of Independence of 1776 and the French Declaration of the Rights of Man of 1789. Examples of civil and political rights are the right to life, the right not to be subjected to torture, the right not to be held in slavery, the right not to be arbitrarily arrested or detained, the right to a fair trial, the right to privacy, freedom of religion, expression, assembly and association, the right to vote and the right not to be discriminated against.

Economic, social and cultural rights are of more recent origin. They derive from "the growth of socialist ideals in the late nineteenth and early twentieth centuries and the rise of the labour movement in Europe".[78] Examples of rights belonging to this category of human rights are the right to work, the right to fair conditions of employment, the right to form and join trade unions, the right to social security, the right to food, clothing and housing, the right to physical and mental health and the right to take part in cultural life. The right to education is also said to be an economic, social and cultural right.[79]

Traditionally, it is stated that whereas civil and political rights are negative, economic, social and cultural rights are positive rights. Civil and political rights are said to be negative because they require state abstention. The state has a duty to refrain from unduly interfering with the individual's sphere of personal freedom. Economic, social and cultural rights are held to be positive because they require state involvement. The state is obligated to take active steps to realise these rights. It is further stated that respect for civil and political rights does not involve financial expenditure but that implementation of economic, social and cultural rights entails

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[77] On the categorisation of human rights into civil and political, economic, social and cultural, and solidarity rights, see, for example, chapter 4 by Rosas, A. and M. Scheinin, "Categories and beneficiaries of human rights", in: R. Hanski and M. Suksi (eds.), *An Introduction to the International Protection of Human Rights: A Textbook*, second edition, Åbo: Institute for Human Rights (Åbo Akademi University), 1999.

[78] Craven, 1995, p. 8.

[79] As will be shown in the discussion below, this is only partially true. In certain respects, the right to education also qualifies as a civil and political right. It further has links with solidarity rights.

extensive expenses to be incurred. Civil and political rights have been labelled "*Abwehrrechte*" (rights aimed at warding off infringements) and economic, social and cultural rights "*Leistungsrechte*" (rights aimed at state performances).[80] To allege such differences between civil and political and economic, social and cultural rights is problematic, however. Both civil and political and economic, social and cultural rights have negative *and* positive aspects. Both cost the state money. In this writer's view, the conventional distinction between civil and political and economic, social and cultural rights rather provides evidence of how a particular right evolved historically and, generally, whether the right's negative or positive aspects are more prominent.[81]

Finally, something should be said about *solidarity rights*. The common feature of solidarity rights is that they accrue to groups of persons rather than to individuals. Solidarity rights have been asserted from the late 1950s onwards. Initially, this occurred in the context of former colonies gaining independence from their mother countries. Colonial territories argued that domination by foreign nations violated their peoples' right to self-determination. With the severance of colonial ties, then, the newly independent but underdeveloped states claimed rights to international assistance and co-operation and to development. However, solidarity rights have also been put forward in different contexts. Rights to peace, to a clean environment and to share in "the common heritage of mankind" have been articulated.

It has been pointed out that the right to education, in orthodox human rights theory, represents an economic, social and cultural right. This is not the whole truth, however. The right to education has two different aspects: a social and a freedom aspect.[82]

On the one hand, the right to education requires an effort on the part of the state to make available various forms of education. The state must invest financial and technical resources in setting up and maintaining an education system. The state's obligation is of a positive nature. This is *the social aspect of the right to education*. It is in this respect that the right to education is an economic, social and cultural right.[83] It has been shown above

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[80] These terms derive from German constitutional law.

[81] For a detailed discussion of this matter, see Chapter 3 *infra*.

[82] The distinction between the social and the freedom aspect of the right to education has first been stressed by Fons Coomans. See Coomans, 1992, pp. 45–46. See also Delbrück, 1992, particularly at p. 104. Delbrück considers the right to education to show a double nature, in that it is a "social right" and a "liberal (classical) human right" at the same time. See further Nowak, 1995b, pp. 195–198, Fernandez and Nordmann, 1998, paras. 22–34 (UN Doc. E/C.12/1998/14), Mehedi, 1998, paras. 5–7 (UN Doc. E/CN.4/Sub.2/1998/10) and Mehedi, 1999b, paras. 50–76 (UN Doc. E/CN.4/Sub.2/1999/10).

[83] It cannot be overemphasised, however, that the right to education, as an economic, social and cultural right, also implies negative duties. See 3.4.2. *infra*.

that the right to education, as an economic, social and cultural right, is the product of late nineteenth and early twentieth century socialist thinking.[84]

On the other hand, the right to education entails freedom and pluralism in education. Parents may choose for their children schools other than those established by the public authorities and they may ensure the religious and moral education of their children in conformity with their own convictions. Individuals may establish and direct private schools. Academic freedom must prevail in educational institutions. The state must further refrain from discriminating against students on grounds, such as race, sex, language, religion or culture. In all these instances, the state is required to withhold itself from unduly interfering with the right to education. The state's duty is negative. This is *the freedom aspect of the right to education.* In this sense, the right to education is a civil and political right.[85] It has been demonstrated that the right to education was, first of all, recognised as a civil and political right.[86] This occurred in the context of liberal ideas on human rights in the eighteenth and nineteenth centuries.

The central provision on the right to education in international human rights law is article 13 of the International Covenant on Economic, Social and Cultural Rights of 1966. Article 13(1) first sentence states in general terms that the states parties to the Covenant recognise the right to education. Both the social and the freedom aspect of the right to education may be found in article 13.[87] The social aspect is covered by article 13(2), the freedom aspect by article 13(3) and (4). Article 13(2) requires states to realise the right to education. Primary education is to be "compulsory and available free to all" (article 13(2)(a)), secondary education is to be made "generally available and accessible to all" (article 13(2)(b)), higher education is to be made "equally accessible to all, on the basis of capacity" (article 13(2)(c)), fundamental education is to be "encouraged or intensified" (article 13(2)(d)) and a system of schools is to be developed, a fellowship system to be established and the material situation of teachers to be improved (article 13(2)(e)). It is clear from the provisions of article 13(2) that the state is expected to take active steps aimed at implementing the right to education. It must utilise the maximum of its available resources to achieve implementation. Article 13(2), it may be stated, imposes a positive duty. Article 13(3) protects the right of parents to choose the school their children should attend and further their right to ensure their children's education

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[84] See 2.3. *supra.*

[85] Again, it needs to be stressed, as a civil and political right, the right to education also implies positive duties. See 3.4.2. *infra.*

[86] See 2.3. *supra.*

[87] See Coomans, 1995, p. 12 and Coomans, 1998a, para. 2 (UN Doc. E/C.12/1998/16).

in conformity with their own convictions. Article 13(4) protects the right of individuals and bodies to set up and operate private schools. In effect, the provisions of article 13(3) and (4) call on the state not to interfere with the rights concerned. The state's duty is negative.

The social and freedom aspects of the right to education may also be found in the provisions on the right to education in other instruments on human rights. The social aspect of the right to education is protected in article 26(1) of the Universal Declaration of Human Rights (1948), article 28(1) of the Convention on the Rights of the Child (1989) and article 4 of the Convention against Discrimination in Education (1960). The provisions in each instance highlight the state's duty to provide primary, secondary and higher education. As part of the freedom aspect of the right to education, parents' right to choose the school their children should attend is protected in article 5(1)(b) of the Convention against Discrimination in Education. Parents' right to have their children educated in conformity with their own convictions is protected in article 18(4) of the International Covenant on Civil and Political Rights (1966) and article 5(1)(b) of the Convention against Discrimination in Education. And, the right to set up and operate private schools is protected in article 29(2) of the Convention on the Rights of the Child. The freedom aspect of the right to education is generally protected in article 26(3) of the Universal Declaration of Human Rights which states that "[p]arents have a prior right to choose the kind of education that shall be given to their children".[88]

The right to education is often studied primarily from its social standpoint. This is rather unfortunate. Such an approach may adversely impact on the protection of the freedom aspect of the right to education.[89] It has been stated that

> [t]he main legal and constitutional problem which the legal regime on education appears to face is precisely a certain downgrading or undervaluation of the primary and undeniable importance of freedom in this domain, an undervaluation which is claimed to be the price to be paid for guaranteeing the other constitutional dimension of the right to education for all, the provision of education.[90]

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[88] See the discussion of Nowak, 1995b, pp. 195–198, who examines how the social and freedom aspects of the right to education are protected in various international instruments on human rights.

[89] On the topic, see Fernandez and Nordmann, 1998, para. 27 (UN Doc. E/C.12/1998/14).

[90] Martínez, J., "El artículo 27 de la Constitución: Análisis de su contenido. Doctrina jurisprudencial. Tratados internacionales suscritos por España", in: *Aspectos jurídicos del sistema educativo*, General Council of Justice, 1993, p. 19. Translation from original Spanish text by Fernandez and Nordmann, 1998, para. 31 (UN Doc. E/C.12/1998/14).

The following is an example of such downgrading or undervaluation which occurs in practice. Article 13(3) of the International Covenant on Economic, Social and Cultural Rights of 1966 protects parents' liberty to choose for their children schools other than those established by the public authorities, if such schools "conform to such minimum educational standards as may be laid down or approved by the State". Rather than drawing the full consequences of parents' liberty to choose the school their children should attend, many states overemphasise the proviso that the state may lay down standards. In many instances, extensive requirements are laid down which are all too restrictive. Obviously, the freedom dimension of the right to education loses all substance in these circumstances.

It is not legitimate to use one generation of human rights against another. Freedom of education may not be demanded whilst denying that education is also an obligation of the state. Conversely, the state's obligation to provide education may not be held to exclude fundamental rights of families and freedom of education.[91] The right to education must not only be understood as a social right which entails pervasive state presence in the field of education but also as a liberal right which provides protection against an omnipresent state authority. In the words of Jost Delbrück, "The right to education as a liberal right [must delineate] the limits of the lawful implementation of the obligations of the State charged to it by the right to education as a social right".[92]

Within the category of economic, social and cultural rights, the right to work has been held to be the most fundamental economic right,[93] the right to an adequate standard of living the most comprehensive social right[94] and the right to education *the most prominent cultural right.*[95] It has been stated that

> education and culture are so indissolubly linked that it is hard to separate the right to one from the right to the other. Education is necessary in order to have access to the cultural models, history and points of reference of the dominant social group of a given society. Education is also fundamental for the individual to be able to participate in the cultural life of that society and to appreciate the benefits of scientific progress. Within an ethnic, religious,

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[91] Fernandez and Nordmann, 1998, para. 31 (UN Doc. E/C.12/1998/14).

[92] Delbrück, 1992, p. 104.

[93] The right to education is an economic right inasmuch as education promotes integration into a modern economy. See Gomez del Prado, 1998, para. 4 (UN Doc. E/C.12/1998/23).

[94] The right to education is a social right inasmuch as it enables the individual "to participate effectively in a free society". See Gomez del Prado, 1998, para. 2 (UN Doc. E/C.12/1998/23).

[95] See Nowak, 1995b, p. 196.

> cultural minority or indigenous group, education is not only the necessary instrument for learning and communicating in a given language and sharing ideas and beliefs (culture), but it is also indispensable for the life and survival of the group.[96]

The category of cultural rights is underdeveloped in human rights law.[97] Patrice Meyer-Bisch has held of cultural rights that their common purpose is cultural identity.[98] "Cultural identity is inherent in the beneficiary and belongs to him. Its non-observance constitutes a violation of the integrity of the human being and renders effective exercise of other human rights impossible".[99] Cultural rights serve man's inherent right to identity. They empower individuals to assert their cultural identity. It is only in the context of such assertion of identity that other human rights can be meaningfully claimed. Human rights, ultimately, cannot be exercised in a "non-cultural" environment. The ability to enjoy human rights is, in effect, premised on participation in cultural activity and cultural rights. The right to education, as a cultural right, entitles individuals to actively participate in the process of defining their cultural identity. It is through such participation that the exercise of other human rights becomes possible. Meyer-Bisch states in this regard that

> [t]he right to education clearly occupies pride of place among cultural rights, since it is the one by which respect for and the protection and development of the right to identity can be achieved. It renders respect for other cultural rights, as well as human rights in general, both possible and realistic. From the very standpoint of any form of individual and collective development, it is the best indicator of a development policy or programme.[100]

Meyer-Bisch considers cultural rights to be cross-sectoral in nature. He states that cultural rights are either economic and social rights in that they "necessitate State support, in the form of schooling programmes, cultural equipment and easy access to the 'benefits of culture' for the underprivileged", or civil and political rights in that they "constitute a claim on the State to the extent that they signify that the latter cannot interfere with the cultural expression of the individuals and groups that make up the nation".[101] In the opinion of Meyer-Bisch, the right to education is a mixed

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[96] Gomez del Prado, 1998, para. 3 (UN Doc. E/C.12/1998/23).

[97] On cultural rights, see Meyer-Bisch, P. (ed.), *Les droits culturels: Une catégorie sous-dévelopée de droits de l'homme*, Fribourg: Editions Universitaires, 1993.

[98] See Meyer-Bisch, 1998, para. 1 (UN Doc. E/C.12/1998/17).

[99] Commentary on the draft Declaration on Cultural Rights drawn up by the Interdisciplinary Ethics and Human Rights Institute of the University of Fribourg, 1998, para. 9.

[100] Meyer-Bisch, 1998, para. 3 (UN Doc. E/C.12/1998/17).

[101] Meyer-Bisch, P. (ed.), *Les droits culturels: Une catégorie sous-dévelopée de droits de l'homme*, Fribourg: Editions Universitaires, 1993, p. 18.

right. On the one hand, it serves civil and political rights, on the other, it falls within the logic of economic and social rights. This view finds support in General Comment No. 11 of the Committee on Economic, Social and Cultural Rights.[102] Paragraph 2 thereof states:

> [The right to education] has been variously classified as an economic right, a social right and a cultural right. It is all of these. It is also, in many ways, a civil right and a political right, since it is central to the full and effective realisation of those rights as well. In this respect, the right to education epitomises the indivisibility and interdependence of all human rights.

In a similar vein, Manfred Nowak has held that "the right to education is probably the only right that reveals aspects falling under all three generations".[103] The social and freedom aspects of the right to education have already been discussed. But, the right to education also has links with solidarity rights.[104] Article 28(3) of the Convention on the Rights of the Child of 1989 states that states parties

> shall promote and encourage international co-operation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.

The latter provision appears to imply a right focusing on educational concerns which accrues to states as collective entities. Poorer countries, it seems, have a claim against richer countries for assistance and co-operation in the sphere of education. Richer nations, in turn, are called upon to help solve poorer nations' educational problems. They are expected to transfer financial and technical resources and their know-how in an effort to reduce the gap between educational facilities in industrialised and developing countries. The claim of poor states must be seen to be an expression of their right to development. This right, not unlike the right to education, is aimed at the ultimate goal of realising all human rights.[105]

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[102] CESCR, General Comment No. 11 (Twentieth Session, 1999) [UN Doc. E/2000/22] Plans of action for primary education (art. 14 ICESCR) [*Compilation*, 2004, pp. 60–63].

[103] Nowak, 1995b, p. 196. See also Mehedi, 1998, paras. 5–7 (UN Doc. E/CN.4/Sub.2/1998/10).

[104] See Nowak, 1995b, p. 198.

[105] *Idem*.

9. *The Right to Education as Part of Customary Law*

Article 38(1)(b) of the Statute of the International Court of Justice instructs the Court to apply "international custom, as evidence of a general practice accepted as law" in deciding disputes submitted to it. This is a direction to the Court to apply customary international law. The two elements for the existence of a rule of customary international law are that there must be a practice generally adhered to by states (*usus*) which states regard as legally binding (*opinio iuris*). Unlike international agreements, customary law binds also those states which have never recognised it formally. National and international courts have relied on international declarations and agreements and national constitutions and laws to assist them in determining whether a norm qualifies as part of customary law.[106]

The question may be asked whether, in view of the many national and international documents which deal with educational issues, the right to education may be considered to have become part of customary international law.[107] Stephen Knight holds that a survey of such documents "compels the conclusion that the right to education . . . qualifies as a customary norm of international law".[108] He refers to the fact that the right to education is protected at the international level under the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child and the Convention against Discrimination in Education *etc*. He notes that the right to education is also protected at the regional level, for example, under the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms.[109] Of the Universal Declaration of Human Rights, it has been stated that its provisions, in themselves, have acquired the force of customary law. Louis Sohn states that "[t]he Declaration, as an authoritative listing of human rights, has become a basic component of international customary law, binding on all states, not only on members of the United Nations".[110] According to this view, article 26 of the

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[106] In the *Western Sahara* Advisory Opinion (1975) ICJ Reports 12, for example, the International Court of Justice relied on the UN Charter and various resolutions of the UN General Assembly to deduce that the right to self-determination of non-self-governing territories formed part of the corpus of customary international law. See also the decision of the US Second Circuit Court of Appeals in the case of *Filartiga v. Pena-Irala*, 630 F.2d 876 (1980) at 881–884, in which the court surveyed a wide array of international and national instruments to conclude that torture constituted a violation of customary international law.

[107] This question is dealt with by Christopher, 1984, pp. 513–536, De la Vega, 1994, pp. 37–60 and Knight, 1995, pp. 183–220.

[108] Knight, 1995, p. 188.

[109] *Ibidem* at pp. 186–198.

[110] Louis Sohn quoted by Knight, 1995, p. 188.

Universal Declaration on the right to education would be binding as customary international law.

These views are very optimistic. In light of the still considerable opposition of many states to economic, social and cultural rights, they are, perhaps, too optimistic. It can be asserted with confidence, however, that two educational principles have become part of customary law, namely, the right to free and compulsory primary education and the right not to be discriminated against in the enjoyment of educational rights.[111]

The right to free and compulsory primary education is protected in the following international instruments: article 26(1) of the Universal Declaration of Human Rights (1948), article 13(2)(a) of the International Covenant on Economic, Social and Cultural Rights (1966), article 28(1)(a) of the Convention on the Rights of the Child (1989) and article 4(a) of the Convention against Discrimination in Education (1960). Many states have ratified these instruments. The right is also protected in the following regional instruments: article 17(2) of the Revised European Social Charter (1996), article 49(a) of the Charter of the Organisation of American States (1948), article 12 of the American Declaration of the Rights and Duties of Man (1948), article 13(3)(a) of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (1988) and article 11(3)(a) of the African Charter on the Rights and Welfare of the Child (1990). The language of the various provisions cited is remarkably uniform.[112] The tone is obligatory. Most texts use the word "shall" to express the nature of the state's duty. The instruments regularly speak of "elementary/primary/basic education" which is to be "free/without charge/without cost" and "compulsory". It should further be noted that many national constitutions and laws protect the right to free and compulsory primary education. On the basis of such considerations, it has, quite correctly, been claimed that "[t]he denial of a free elementary or primary education to children is thus a clear violation of this customary right under international law".[113]

Likewise, *the right not to be discriminated against in the enjoyment of educational rights* may be held to be part of customary law. Article 28(1) of the Convention on the Rights of the Child (1989) envisages that the right to education be achieved "on the basis of equal opportunity". Article 4 of the Convention against Discrimination in Education (1960) obligates states "to formulate, develop and apply a national policy which . . . will tend to

[111] See Hodgson, 1998, pp. 63–64.
[112] See Knight, 1995, p. 197.
[113] *Ibidem* at p. 197.

promote equality of opportunity and of treatment in the matter of education". The right to non-discrimination in the sphere of education is also protected in the following international and regional instruments: article 26 read with article 2 of the Universal Declaration of Human Rights (1948), article 13 read with article 2(2) of the International Covenant on Economic, Social and Cultural Rights (1966), article 2 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (1952) read with article 14 of the European Convention (1950), article 13 read with article 3 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (1988) and article 17(1) read with article 2 of the African Charter on Human and Peoples' Rights (1981). Many national constitutions and laws protect the right to non-discrimination in the sphere of education.[114]

It follows from the above that a state which has not ratified the International Covenant on Economic, Social and Cultural Rights, which guarantees the right to free and compulsory primary education in article 13(2)(a) and the right not to be discriminated against in the enjoyment of educational rights in article 13 read with article 2(2), will, nevertheless, be obligated to realise these rights. The state's obligations flow from customary international law.

[114] See De la Vega, 1994, p. 48.

CHAPTER THREE

THE RIGHT TO EDUCATION AND THE DISPUTED CATEGORY OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

1. *Introduction*

In the previous chapter, it was stated that the right to education (also) belongs to the category of economic, social and cultural rights. It was stated that the right to education, amongst others, requires an effort on the part of the state to make primary, secondary and higher education available. It was said that this demanded of the state that it make available financial and technical resources with a view to setting up and maintaining an education system. This was referred to as the social aspect of the right to education.

The social dimension of the right to education has been criticised. This must be seen in the context of general ambivalence towards economic, social and cultural rights. Most people reject state action which violates civil and political rights in no uncertain terms. They are much more tolerant, however, when human misery is the result of preventable denials of the basic necessities of life, such as essential foodstuffs, primary health care, shelter or basic forms of education. It is against this background that one must ask: Are economic, social and cultural rights, in fact, human rights? This issue has been debated at the international level ever since the end of the Second World War when human rights were placed on the agenda of the newly constituted United Nations Organisation. In this context, questions have been asked relating to the character of economic, social and cultural rights, their relationship with civil and political rights, whether economic, social and cultural rights are judicially enforceable and what the obligations of states are in terms of international agreements which protect economic, social and cultural rights. In this chapter, an attempt will be made to answer these questions. It is set out to show that economic, social and cultural rights are, in fact, human rights. This is considered necessary before any further discussion of the right to education is embarked upon. Ultimately, the fate of the right to education, as an economic, social and cultural right, hinges on that of economic, social and cultural rights as a category.

First of all, a brief account of the historical development of economic, social and cultural rights will be given. The focus will be on the drafting of the International Covenants on Civil and Political and Economic, Social and Cultural Rights. This is followed by an examination of the arguments traditionally raised against economic, social and cultural rights. Typical of these arguments are the views of Cranston, Bossuyt and Vierdag, which will be considered. Two important arguments in support of economic, social and cultural rights will then be analysed: firstly, the notion that all human rights are interdependent and indivisible and, secondly, the concept that all human rights impose on the state duties to 1.) respect, 2.) protect and 3.) fulfil. Finally, the extent to which economic, social and cultural rights are justiciable will be studied.

On a technical point, the abbreviation CPR for civil and political right(s) and the abbreviation ESCR for economic, social and cultural right(s) will be applied in this and subsequent chapters.

2. *The Historical Development of Economic, Social and Cultural Rights*

It has been stated that CPR were the product of the Age of Enlightenment of the eighteenth and nineteenth centuries.[1] It is less known that also ESCR were debated at the time.[2] They were not as successful politically, though, as CPR. It was not until the end of the nineteenth century that a concern for ESCR emerged at the political level. In the 1880s, social security schemes were introduced in Germany under Chancellor Otto von Bismarck. In the 1930s and 40s, the advancement of welfare rights received support from the United Kingdom and the United States of America. In the United Kingdom,[3] the later Prime Minister Harold MacMillan argued in 1933 for social reconstruction and the elimination of poverty. In 1938, he published "The Middle Way" on the subject. In the United States of America,[4]

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[1] See 2.3. *supra.*

[2] See, for example, the writings of Thomas Paine. In Part Two of his work *Rights of Man*, Paine outlined an economic programme which reflected a welfare state approach. Paine envisaged a graduated income tax to finance a benefit to newly-wedded couples, a maternity allowance, a benefit for poor families to enable them to raise and educate their children, public employment for those without work, a system of social security providing for workers to retire at the age of sixty and a benefit for the dignified burial of those who died in poverty. In the context of his proposals about pensions, Paine emphasised that what he had in mind was not of the nature of a charity but a right. Paine argued that rights were crucial not only to political but also to social justice. A short note on the philosophy of Thomas Paine may be found in Hunt, 1996, pp. 5–7.

[3] See Eide, 1995, p. 27.

[4] *Ibidem* at pp. 27–30.

President Franklin Roosevelt advanced the cause of ESCR. Reference may be made to two of his State of the Union addresses. In his 1941 address, Roosevelt introduced the notion of four freedoms, freedom of speech, freedom of belief, freedom from fear and freedom from want. Freedom from want referred to the individual's right that his welfare needs be addressed by the state. In his 1944 address, Roosevelt advocated the adoption of an "Economic Bill of Rights":

> We have come to the clear realisation of the fact that true individual freedom cannot exist without economic security and independence. "Necessitous men are not free men." People who are hungry and out of job are the stuff of which dictatorships are made.[5]

Roosevelt proposed the inclusion of many of the ESCR which subsequently were included in the Universal Declaration of Human Rights. On 11 August 1941, British Prime Minister Sir Winston Churchill and US President Roosevelt adopted the Atlantic Charter. It provided for eight common principles in the national policies of their countries, and on which they based their hopes for a better future of the world. The fifth principle sought the fullest co-operation between all nations with the object of securing, for all, improved labour standards, economic advancement and social security.[6]

ESCR came to be accepted at the international level from the latter part of the nineteenth century onwards. It was realised that the improvement of working conditions required international co-operation. In 1890, an international conference was convened on the issue. In 1900, the International Association for the Legal Protection of Workers was founded with its headquarters in Basel, Switzerland. At conferences in 1905 and 1906 based on the preparatory work of the Association, the first international agreements on labour standards were signed. The political events leading to the First World War brought these efforts temporarily to an end. They were resumed, however, with a much stronger impetus with the establishment of the International Labour Organisation in 1919.[7]

Nevertheless, it was only after the Second World War that the international human rights movement emerged.[8] As a reaction to the atrocities

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[5] Roosevelt quoted by Eide, 1995, pp. 28–29.
[6] See Eide, 1995, p. 27.
[7] *Ibidem* at pp. 27–28.
[8] Prior to World War II, international law, generally, did not concern itself with how states treated individuals. Exceptions existed in the cases of slavery, humanitarian assistance, the treatment of aliens, minorities and the laws of war. The protection offered in these cases is of limited scope, however, and politically rather than idealistically motivated. Furthermore, whereas human rights accrue to the individual, the point of departure, in the above instances, is to accord rights to states, which rights, "as a side-effect", offer protection to the individual. See Craven, 1995, p. 6.

of World War II, the international community appreciated that a new world order should be established, founded on a commitment to protect human rights. Accordingly, the Charter of the United Nations mentions the protection of human rights as one of the objects of the UN and imposes certain obligations on UN members in this regard.[9] In pursuance of this commitment to human rights, the UN, subsequently, set out to lay down the human rights which were to be protected. In the years 1947–1948, the Universal Declaration of Human Rights (UDHR) was drawn up and adopted.[10] It was generally accepted that it would have to include ESCR.[11] Asbjørn Eide states that the great contribution of the UDHR is that "it extended the human rights platform to embrace the whole field—civil, political, economic, social and cultural and made the different rights interrelated and mutually enforcing".[12] The UDHR was, however, only intended to be a non-binding expression of ideals to be achieved. These ideals were subsequently meant to be positivised at the international level by a binding Covenant on human rights.[13]

At an early stage of the drafting process of the Covenant, however, differences of opinion arose between Western states, on the one hand, and states with a communist system, on the other.[14] Whereas the former argued that there should be two separate legal instruments, one protecting CPR and the other ESCR, the latter argued in favour of one legal instrument, protecting both CPR as well as ESCR. Underlying the differences of opin-

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[9] The Preamble of the UN Charter states that members of the UN ". . . reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small . . .". Art. 1(3) states that it is one of the purposes of the UN, "To achieve international co-operation . . . in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion". Art. 55 states, "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: (a) . . .; (b) . . .; and (c) universal respect for, and the observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion". Art. 56 states, "All Members pledge themselves to take joint and separate action in co-operation with the Organisation for the achievement of the purposes set forth in Article 55".

[10] UNGA Resolution 217A (III) of 10 December 1948.

[11] See Eide, 1995, p. 28. The UDHR, in fact, protects the following ESCR: the right to social security (art. 22), the right to work, to fair conditions of employment and to form and join trade unions (art. 23), the right to rest and leisure, including holidays with pay (art. 24), the right to an adequate standard of living, including food, clothing, housing, medical care and social security (art. 25), the right freely to participate in the cultural life of the community (art. 27) and—*the right to education* in article 26.

[12] Eide, 1995, p. 28.

[13] *Ibidem* at p. 30.

[14] See the discussion of the historical development of ESCR within the context of the UN in Coomans, 1992, pp. 9–12.

ion was the question whether or not ESCR differed in important respects from CPR and needed, therefore, to be regulated differently in a separate instrument. The Cold War and the ideological struggle between capitalism and communism had the effect that the debate assumed a polemical nature. Philip Alston argues that the Cold War changed

> what was a rational debate between 1944 and 1947 (culminating in the adoption of the Universal Declaration) into a struggle that encouraged the taking of extreme positions and prevented objective consideration of the key issues raised by the concept of economic and social rights.[15]

Communist countries preferred an all-inclusive instrument with a limited implementation procedure. Communist countries perceived the realisation of human rights to be an essentially domestic affair, and, therefore, held that international supervision should be of limited scope. These countries emphasised the importance of ESCR. CPR could not really be reconciled with their societal vision and, as a consequence, little attention was paid to them in practice. Western countries preferred two separate instruments, each with its own implementation procedure. They argued that whereas CPR needed to be protected to guarantee the free development of the individual, the protection of ESCR did not constitute a priority in a capitalist system. ESCR were to be realised progressively.[16]

The supporters of a single instrument for both categories of rights argued that there existed no hierarchy of rights:

> All rights should be promoted and protected at the same time. Without economic, social and cultural rights, civil and political rights might be purely nominal in character; without civil and political rights, economic, social and cultural rights could not be long ensured.[17]

They contended that if two separate instruments were drafted, this would mean that states would accord a lower priority to ESCR as their implementation requires financial resources. In effect, states would defer the realisation of ESCR indefinitely.[18]

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[15] Alston, 1994, p. 152. It is noteworthy in this regard that both Eastern and Western states concurred that the UDHR should include ESCR. In fact, especially Western states promoted the cause of ESCR. It was appreciated in the West that the political turmoil and the emergence of totalitarian regimes in the period between the two World Wars had been the consequence of unemployment and poverty. One of the main texts relied on in drafting the UDHR was a draft prepared by the American Law Institute. The working group responsible for the draft had a preponderance of US and Canadian experts. Furthermore, during the drafting of the UDHR, the US spoke very clearly in favour of the inclusion of ESCR and repeated Roosevelt's words that "a man in need is not a free man". On these facts, see Eide, 1995, pp. 29–30.

[16] See Coomans, 1992, pp. 9–10.

[17] UN Doc. A/2929, p. 7, para. 8.

[18] See Coomans, 1992, pp. 10–11.

The supporters of two separate instruments argued that CPR differed substantially from ESCR. Whereas the former were rights of the individual against unlawful action of the state, the latter required the state to take positive measures. Furthermore, CPR were "legal rights" which could be judicially enforced, whereas ESCR were programme rights not capable of judicial enforcement. Therefore, implementation of the former could best be achieved by an international quasi-judicial organ, implementation of the latter best by a system of periodic state reports. Moreover, it was alleged that whilst a Covenant containing only CPR would be universally acceptable, ESCR could not lay claim to universality.[19]

In the end, the General Assembly decided in 1951 in Resolution 543 (VI) that Covenants should be prepared for each category of rights.[20] Eventually then, in 1966, the General Assembly adopted the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[21] Both Covenants entered into force ten years later in 1976.

Kitty Arambulo points out that the dispute resulting in two Covenants had an impact on the formulation which was used for CPR, on the one hand, and ESCR, on the other, and on the means of implementation, chosen in each Covenant.[22] As regards the formulation of rights, she states that the perception that ESCR are programmatic in nature, vague and insufficiently defined, is reflected in the general phrases used by the ICESCR, namely "the States Parties recognise the right to . . ." and "the States Parties undertake to ensure the right to . . .". The ICCPR uses more direct formulations, such as "everyone shall have the right to . . ." and "no one shall be . . .", which were chosen to make it clear that CPR were considered to be negative in character, "legal" and justiciable.[23] As regards the means of implementation, she refers to the claim raised in the course of drafting that "[t]he nature of the rights and the obligations laid down in each covenant and the fact that civil and political rights were to be applied forthwith while economic, social and cultural rights were to be

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[19] *Ibidem* at p. 11.

[20] More will be said on this resolution when discussing the interdependence and indivisibility of all human rights. See 3.4.1. *infra*.

[21] International Covenant on Civil and Political Rights (1966) 999 UNTS 171. International Covenant on Economic, Social and Cultural Rights (1966) 993 UNTS 3. The ICESCR protects the following ESCR: the right to work (art. 6), the right to fair conditions of employment (art. 7), the right to form and join trade unions and the right to strike (art. 8), the right to social security (art. 9), the right to the protection of the family (art. 10), the right to an adequate standard of living, including food, clothing and housing (art. 11), the right to health (art. 12), the right to take part in cultural life (art. 15) and—*the right to education* in arts. 13 and 14.

[22] See Arambulo, 1998, pp. 9–23.

[23] *Ibidem* at p. 11.

achieved progressively . . . justified the preservation of the distinction between the . . . methods of implementation".[24] The ICESCR provides for a system of periodic state reports only.[25] States parties are required to submit reports on the measures which they have adopted and the progress made in achieving the observance of Covenant rights.[26] These reports are then to be considered by the Economic and Social Council.[27] The Council has created an expert committee, the Committee on Economic, Social and Cultural Rights, to assist it in this regard.[28] Supervision of the ICCPR is entrusted to the Human Rights Committee.[29] Likewise, states parties are required to submit reports.[30] The Committee considers these reports.[31] But, the Committee is also competent to receive and consider state complaints, *i.e.* claims by one state party that another state party is not fulfilling its obligations under the Covenant.[32] And, what is more, it can receive and consider communications from individuals claiming to be victims of violations of their rights under the Covenant.[33]

Meanwhile, a number of international and regional human rights agreements, protecting (also) ESCR, have been adopted. The most important instruments at the international level are the International Convention on the Elimination of All Forms of Racial Discrimination of 1965, the Convention on the Elimination of All Forms of Discrimination against Women of 1979, the Convention on the Rights of the Child of 1989 and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families of 1990. The most important instruments at the regional level are the Revised European Social Charter of 1996, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights of 1988 and the African Charter on Human and Peoples' Rights of 1981. Norms in the field of ESCR have also been formulated under the auspices of the Specialised Agencies of the UN, in particular, the International Labour Organisation (ILO) and the United Nations Educational, Scientific and Cultural Organisation (UNESCO). For the sake of completeness, it should, finally, be pointed

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[24] *Idem*.
[25] Part IV ICESCR.
[26] Art. 16(1) ICESCR.
[27] Art. 16(2)(a) ICESCR.
[28] ECOSOC Resolution 1985/17. The supervision of the ICESCR by the Committee on Economic, Social and Cultural Rights will be considered in more detail in Chapter 8 *infra*.
[29] Art. 28 ICCPR.
[30] Art. 40(1) ICCPR.
[31] Art. 40(2) ICCPR.
[32] Arts. 41 and 42 ICCPR.
[33] (First) Optional Protocol to the ICCPR.

out that CPR and ESCR are also protected by the Commission on Human Rights.[34]

3. *Arguments Against Economic, Social and Cultural Rights*

There are writers on human rights who reject the notion of ESCR. They consider human rights to be moral rights. They argue that ESCR lack the moral importance to qualify as human rights. Maurice Cranston's views are representative of this approach. Other writers accept ESCR as a moral category. They argue, however, that, in legal terms, ESCR differ fundamentally from CPR. It is maintained that, as a result of these differences, the modalities of application of the two categories of rights differ in important respects. It is further alleged that the mechanisms of protection of the two categories must differ significantly. It appears that this theory, although it does not deny the legally binding character of ESCR, considers ESCR to be second-rate human rights. Marc Bossuyt's views represent this approach. Other writers, who also accept ESCR as a moral category, argue that provisions in human rights treaties can only be considered to reflect legal rights if, firstly, they are made enforceable before a competent judicial tribunal and, secondly, they are described in terms of law. On the basis of these criteria, provisions of the ICCPR are considered legal rights, those of the ICESCR not. From this it is concluded that provisions of the former impose legal obligations on states, those of the latter not. E. Vierdag's views reflect this approach. The views of Cranston, Bossuyt and Vierdag will now be analysed.

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[34] The Commission on Human Rights has been set up under art. 68 UN Charter by the Economic and Social Council (ECOSOC) for the promotion of human rights. In 1967, ECOSOC authorised the Commission on Human Rights to deal with information received which provides reliable evidence of a consistent pattern of gross violations of human rights in a country. The information is obtained from the reports of Special Rapporteurs of the Commission, governments and NGOs. The Commission considers the information in public debates. The mechanism is known as "1235 procedure". (See ECOSOC Resolution 1235 (XLII) of 6 June 1967.) In 1970, a new mechanism was created. It provides for the submission by individuals and NGOs of communications which furnish reliable evidence of a consistent pattern of gross violations of human rights. The Commission considers the communications in closed meetings. The mechanism (which is not a true individual petition procedure) is known as "1503 procedure". (See ECOSOC Resolutions 1503 (XLVIII) of 27 May 1970 and 2000/3 of 16 June 2000.) As a consequence of these procedures, the Commission may appoint country or thematic Special Rapporteurs or expert Working Groups to deal with the human rights situation in particular countries or with particular human rights issues. The procedures apply in the case of violations of both CPR and ESCR. On these two procedures, see Castermans-Holleman, 1995, pp. 353–373, who argues that the procedures were seldom applied in the case of ESCR up to 1995.

3.1. *Cranston's Views on Economic, Social and Cultural Rights*

Maurice Cranston considers ESCR not to constitute human rights.[35] In terms of his approach, the right to education, as an ESCR, does not qualify as a human right. He states:

> I believe that a philosophically respectable concept of human rights has been muddled, obscured, and debilitated in recent years by an attempt to incorporate into it specific rights of a different logical category. The traditional human rights are political and civil such as the right to life, liberty, and a fair trial. What are now being put forward as universal rights are economic and social rights, such as the right to employment insurance, old-age pensions, medical services and holidays with pay. There is both a philosophical and a political objection to this. The philosophical objection is that the new theory of human rights does not make sense. The political objection is that the circulation of a confused notion of human rights hinders the effective promotion of what are currently seen as human rights.[36]

Cranston poses four requirements for rights to qualify as human rights: Firstly, the right concerned must be counterbalanced by a duty of the state which can pass the practicability test (in effect, the right must be judicially enforceable), secondly, legislation must suffice to secure the right, thirdly, the right must be genuinely universal and, fourthly, the right must be of paramount importance. Cranston argues that CPR fulfil these requirements but ESCR not.[37]

As regards the first requirement, Cranston states that CPR can be rendered judicially enforceable merely by creating a court with powers of enforcement. This is held not to be possible for ESCR which are perceived to be too imprecise for this purpose.[38] This claim implies that a right qualifies as a human right only if the conditions for its enforcement exist immediately. Evidently, however, this requirement is not supported by the community of states, which in article 2(1) ICESCR has agreed that ESCR need only be realised *progressively*. The consensus, therefore, is that it may, quite legitimately, take some time for ESCR to be defined more clearly and to be rendered judicially enforceable.[39]

Concerning the second requirement, Cranston states that legislation suffices to secure CPR. ESCR are held to require more than mere legislation. Resources are said to be additionally required.[40] It needs to be pointed out, however, that the realisation of many CPR also requires

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[35] See Cranston, 1973.
[36] *Ibidem* at p. 65.
[37] *Ibidem* at pp. 66–69.
[38] *Ibidem* at p. 66.
[39] See Arambulo, 1999, pp. 59–60.
[40] See Cranston, 1973, p. 66.

resources. To ensure the right to a fair trial, for example, the state must provide adequate judicial machinery. This involves substantial expenses to be incurred by the state.[41]

Cranston's third requirement is that the right at issue must be genuinely universal. He perceives CPR to be universally accepted but ESCR not. He seeks to illustrate that ESCR are not universally accepted by referring to the ESCR which entitles people to holidays with pay.[42] It is submitted that Cranston conducts his reasoning *ad absurdum* by using the example he does. Many ESCR, such as those to food, shelter or education, must clearly be considered to be universal, as all people require these rights to be fulfilled.[43] As for the right to education, this has, in fact, been demonstrated in the discussion above on the universal acceptance of this right.[44]

Finally, Cranston poses the requirement that the right at issue must be of paramount importance. In his view, CPR are "morally compelling", whereas ESCR are mere "utopian aspirations".[45] He states that to conceive ESCR as human rights is "to push all talk of human rights out of the clear realm of the morally compelling into the twilight world of utopian aspiration".[46] Kitty Arambulo has rejected this line of reasoning. She states that many ESCR do, in fact, pass Cranston's test of paramount importance. "The importance of the right to food, shelter and an adequate standard of health for the very existence of a human being bears evidence to this".[47] Arambulo's argument is supported by the present writer. It is held that many economic, social and cultural needs may be considered to be just as morally compelling as CPR.[48] Education may be taken as an example. It has been stated above that the right to education is an empowerment right.[49] It is only the enjoyment of the right to education which makes the exercise of many other rights, also CPR, possible. Schools are vitally important for the preservation of a democratic system of government. They further provide individuals with the basic tools to lead productive lives. If these factors are duly appreciated, the right to education surely must be deemed to be morally compelling. In a similar way, it may be shown that rights to food, shelter or health are morally compelling.

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[41] See Arambulo, 1999, p. 61.
[42] See Cranston, 1973, p. 67.
[43] See Arambulo, 1999, p. 62.
[44] See 2.7. *supra.*
[45] See Cranston, 1973, pp. 67–69.
[46] *Ibidem* at p. 68.
[47] Arambulo, 1999, p. 63.
[48] *Ibidem* at pp. 58–59.
[49] See 2.5. *supra.*

3.2. *Bossuyt's Views on Economic, Social and Cultural Rights*

Marc Bossuyt argues that, in legal terms, ESCR differ fundamentally from CPR. He maintains that as a result of these differences the modalities of application of the two categories of rights differ in important respects. He further alleges that the mechanisms of protection of the two categories must differ significantly. It appears that his theory, although it does not deny the legally binding character of ESCR, considers ESCR to be second-rate human rights.[50] In terms of Bossuyt's views, the legal nature of the right to education differs fundamentally from that of any CPR. Seemingly, Bossuyt would consider the right to education a human right of lesser legal importance than any CPR.

The fundamental tenet of Bossuyt's theory is that CPR and ESCR differ because the realisation of the latter requires a financial effort on the part of the state while this is not the case in respect of the former.[51] This may be contested, however. The implementation of many CPR costs money as well. Examples are the right to a fair trial or the right to vote.[52] Bossuyt considers these expenditures to be modest[53] and not to exceed the minimum required to ensure the very existence of the state.[54] To this it should be responded that for many developing countries the costs involved in setting up adequate judicial and legal aid systems and holding regular elections are considerable.[55] Even for industrialised countries the expenses may be substantial. The Canadian case of *R v. Askov*[56] may be cited to illustrate that CPR not only cost money but that they may be expensive, indeed. The case concerned the right to be tried within a reasonable period of time. The court had found that detention for thirty-four months from first appearance to dismissal of the accused violated his right to be tried within a reasonable period of time. To ensure compliance with the court's

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[50] See Bossuyt, 1975, pp. 783–820 and Bossuyt, 1993, pp. 47–55. For a critique of Bossuyt's views, see Arambulo, 1999, pp. 71–83.

[51] See Bossuyt, 1975, p. 790, where he states, "The reason for the difference between 'civil rights' and 'social rights' cannot be explained but in terms of the presence or absence of a financial obligation on the state in the realisation of the rights concerned. In effect, unlike civil rights, social rights require a financial effort by the state: the granting of social rights costs money, whereas the respect of civil rights does not so cost any money". [Own translation from original French text, "La cause de la différence entre 'droits civils' et 'droits sociaux' ne peut s'expliquer que par la présence ou par l'absence d'un apport financier de l'Etat dans la réalisation des droits concernés. En effet, contrairement aux droits civils, les droits sociaux nécessitent un effort financier de l'Etat: l'octroi des droits sociaux coûte de l'argent, alors que le respect des droits civils n'en coûte pas".]

[52] See Van Hoof, 1984, p. 103 and also Hunt, 1996, pp. 54–64.

[53] See Bossuyt, 1975, p. 790.

[54] *Ibidem* at p. 796.

[55] See Van Hoof, 1984, p. 103.

[56] (1990) 2 S.C.R. 1199.

decision, the authorities had to spend over twenty-eight million US dollars [!] to improve court resources, appoint more judges and hire more state attorneys and court officials.[57]

Bossuyt further holds that CPR require state abstention but ESCR state involvement. He considers CPR to impose negative, ESCR positive obligations.[58] This view should also not go unchallenged. Both CPR and ESCR imply abstention and involvement of the state. Both CPR and ESCR have negative and positive aspects.[59] The right to life, a CPR, may, for example, require criminalisation of abortion and euthanasia in certain circumstances. This means positive state action. International jurisprudence confirms that CPR may require positive state action. In the case of *Airey v. Ireland*,[60] the European Court of Human Rights stated as follows on the right to a fair trial, protected in the European Convention on Human Rights (ECHR), which essentially protects CPR:

> [F]ulfilment of a duty under the Convention on occasion necessitates some positive action on the part of the State; in such circumstances, the State cannot simply remain passive . . . The obligation to secure an effective right of access to the courts falls into this category of duty.[61]

Conversely, ESCR demand of the state not only positive steps. They also require that the state does not unduly interfere with individual freedom. This is a negative duty. Sometimes even this is the state's predominant duty. The right to form and join trade unions is a case in point.

Premised on the alleged dichotomy between CPR and ESCR, Bossuyt deduces that the two categories of rights differ both in content and character.

Firstly, Bossuyt's remarks on the aspect of *content* should be examined.[62] Bossuyt considers CPR to be invariable in content. In his view, as CPR do not involve state expenditure, they are minimal rights which cannot vary from one country to another. ESCR, he considers, are variable in content. He holds that as ESCR require expenses to be incurred by the state, their content depends on the level of economic development attained

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[57] The case is briefly discussed by Hunt, 1996, p. 57.

[58] See Bossuyt, 1975, p. 790.

[59] See Van Hoof, 1984, p. 103.

[60] *Airey v. Ireland*, Judgement of 9 October 1979, Publications of the European Court of Human Rights, Series A, Vol. 32.

[61] *Ibidem* at para. 35. In this case, the applicant wished to petition the Irish High Court for a judicial separation. She could not afford a lawyer and legal aid for civil proceedings was not available. She made an application under the ECHR on the ground *inter alia* that she had been denied access to a court (art. 6). The European Court held in her favour and stated that, in the present type of situation, the state could meet its duty, for example, by simplifying judicial separation procedures or by providing legal aid.

[62] See Bossuyt, 1975, p. 790.

by a state. The welfare claims of the individual are held to be dependent on the extent to which ESCR have been implemented by a state. It should be realised, however, that CPR are variable too. In support of this statement, one may refer to the case law on the ECHR.[63] The Convention, which, as has been indicated, protects primarily CPR, "has . . . been interpreted by the European Commission and the European Court of Human Rights so as to deny the existence of a uniform European standard applicable in all cases".[64] The supervisory bodies have acknowledged that states parties have a margin of appreciation in the realisation of CPR. Article 10(1) ECHR, for example, protects the right to freedom of expression. Article 10(2) provides for the limitation thereof, as necessary in a democratic society, *inter alia* for the protection of morals. In the case of *Handyside v. United Kingdom*,[65] the Court held that "[s]tate authorities are in principle in a better position than the international judge to give an opinion on the exact content of [the morality requirement]", in other words, that a measure of latitude would be left to domestic discretion in cases involving the protection of morals.[66]

Next, Bossuyt's remarks on the aspect of *character* should be examined.[67] Bossuyt views CPR as having an absolute character. He perceives them not to have been created by positive law but to be inherent in every human being. Human dignity is seen as their material source. In contradistinction, ESCR, Bossuyt holds, are relative. He argues that man cannot obtain the goods and services which are covered by these rights unless the state makes these rights subjective rights and takes positive measures to implement them. These views, which ascribe an absolute character to CPR, are difficult to refute. They are based on a natural law argument. Such arguments are not scientifically veritable and, therefore, difficult to rebut. There is, however, no convincing argument to support the contention that ESCR should not be conceived as emanating from human dignity as well.[68] It has been stated above that, in this writer's view, human dignity constitutes the ultimate reason for protecting the right to education as a human right.[69] The same argument may be made for other ESCR.

As a result of the alleged differences in the legal nature of CPR and ESCR, Bossuyt concludes that the modalities of application of CPR and

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[63] See Van Hoof, 1984, pp. 103–104.
[64] *Ibidem* at p. 103.
[65] *Handyside v. United Kingdom*, Judgement of 7 December 1976, Publications of the European Court of Human Rights, Series A, Vol. 24.
[66] *Ibidem* at para. 48.
[67] See Bossuyt, 1975, pp. 790–791.
[68] See Van Hoof, 1984, p. 104.
[69] See 2.4. *supra*.

ESCR differ in important respects. He argues, firstly, that CPR must be implemented immediately whilst ESCR can only be implemented progressively, secondly, that CPR must be respected in their entirety whilst, in the case of ESCR, the state can choose which rights it accepts and, thirdly, that CPR must be ensured to everybody whilst, in the case of ESCR, priority must be given to certain groups of the population.[70] These differences are too rigid, however. This may be illustrated by referring to the ECHR.[71] As regards the first difference, it should be observed that the European Convention is applied dynamically under its supervisory system. States parties continuously have to adapt to the human rights standards thus developed. In many instances, they are not able to do so immediately and can do so only with time. It should be concluded, therefore, that also CPR can often only be implemented progressively. As regards the second difference, it must be conceded that the European Convention does not grant states parties the choice of accepting only some of the rights it contains, as instruments protecting ESCR sometimes do. It needs to be pointed out, however, that the Convention allows states parties to make reservations to treaty provisions,[72] under certain circumstances to derogate from their obligations in times of emergency[73] and to limit many of the rights of the Convention to a considerable extent.[74] Thus, it cannot really be said that CPR must be accepted in their entirety. Finally, as regards the third difference, it may be shown that article 16 of the European Convention allows for restrictions to be imposed on the political activity of aliens and further that the doctrine of "inherent limitations", developed under the Convention's supervisory system, allows for the rights of persons with special legal positions, such as detained persons, psychiatric patients, soldiers or civil servants, to be limited. Therefore, CPR need not always be ensured to everybody to the same extent.

Bossuyt further concludes that the mechanisms of protection of CPR and ESCR must differ significantly. CPR are to be protected judicially, ESCR by administrative means.[75] He argues that it is easy for a judicial tribunal to determine whether or not a CPR has been violated, as realisation of these rights requires no active intervention on the part of the state. The realisation of ESCR, however, requires the state to enact elaborating legislation, which, in turn, necessitates decisions on how to utilise

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[70] See Bossuyt, 1975, pp. 791–792.
[71] See Van Hoof, 1984, pp. 104–105.
[72] Art. 64 ECHR.
[73] Art. 15 ECHR.
[74] See, for example, the restrictions that may be imposed on the right to freedom of expression in terms of art. 10(2) ECHR.
[75] See Bossuyt, 1975, pp. 793–794.

limited available resources to be made. These decisions should be entrusted to political and administrative bodies. The decisions of these bodies, Bossuyt opines, could be subjected to a mechanism of administrative control. In effect, Bossuyt disputes the justiciability of ESCR. It is considered desirable to deal with the justiciability of ESCR under a separate heading at the end of this Chapter.[76] Suffice it to state at this juncture that the better view is to consider ESCR justiciable in certain respects.

In summary, ESCR cannot be deemed to differ fundamentally from CPR, as maintained by Bossuyt. Granted, there are differences between the two categories of rights. These differences are much more subtle, however. The differences that exist are differences of degree rather than differences in principle.

3.3. *Vierdag's Views on Economic, Social and Cultural Rights*

E. Vierdag argues that provisions in human rights treaties can only be considered to reflect legal rights if, firstly, they are made enforceable before a competent judicial tribunal and, secondly, they are described in terms of law. On the basis of these criteria, he perceives provisions of the ICCPR to be legal rights, and those of the ICESCR not to be legal rights. From this he concludes that provisions of the former impose legal obligations on states, those of the latter not.[77] In terms of Vierdag's views, because article 13 ICESCR on the right to education has not been made enforceable by means of judicial remedies and has not been described in terms of law, it cannot be considered to constitute a legal right and to impose legal obligations on states.

Vierdag requires provisions in human rights treaties to be buttressed by judicial remedies before they can be considered to reflect legal rights. He argues that international law calls for a judicial remedy as precondition for the existence of a right.[78] "[O]nly enforceable rights [can] be considered as 'real', legal, rights", he says.[79] On this premise, he holds that the provisions of the ICCPR give rise to legal rights, while those of the ICESCR do not. As regards the ICCPR,[80] he refers to article 2(3) which

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[76] See 3.5. *infra*.

[77] See Vierdag, 1978, pp. 69–105. For a critique of Vierdag's views, see Arambulo, 1999, pp. 83–96.

[78] In support of his view, Vierdag, 1978, pp. 71–75 invokes international law standards on the treatment of aliens which, he argues, require legal remedies to be made available to aliens and, further, also the field of the international protection of CPR which, he argues, regards the availability of legal remedies as inherent in the granting of such rights.

[79] Vierdag, 1978, pp. 76–77.

[80] *Ibidem* at pp. 73–75.

requires an effective remedy to be placed at the disposal of a person whose rights under the Covenant have been violated.[81] He adds that international supervision is provided for by the (First) Optional Protocol to the Covenant which contains an individual complaints procedure.[82] The Human Rights Committee, the supervisory body of the Covenant, is competent to receive and consider communications from individuals who claim to be victims of violations of their rights under the Covenant.[83] As regards the ICESCR,[84] Vierdag notes the lack of similar remedies.

Vierdag regards CPR to be judicially enforceable.[85] ESCR, however, he maintains, are not so enforceable.[86] He holds that the enforceability of ESCR is limited to those benefits which are available, *i.e.* which the existing legislative and administrative framework already provides for. Nothing more can be claimed. To support his view, he refers to the so-called "*Belgian Linguistic Case*", decided by the European Court of Human Rights in 1968.[87] *In casu*, the Court stated with regard to the right to education in article 2 of the First Protocol to the ECHR that "[t]here neither was, nor is now, therefore, any question of requiring each State to establish such [an education] system, but merely of guaranteeing to persons subject to the jurisdiction of the Contracting Parties the right, in principle, to avail themselves of the means of instruction existing at a given time".[88]

Vierdag further holds that economic, social and cultural as well as legal conditions are not as yet such that ESCR can be described in terms of law.[89] He states:

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[81] Art. 2(3) ICCPR states, "Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted".

[82] Art. 2 (First) Optional Protocol to the ICCPR.

[83] Art. 1 (First) Optional Protocol to the ICCPR. See Vierdag, 1978, p. 78.

[84] See Vierdag, 1978, pp. 83–94.

[85] *Ibidem* at p. 78.

[86] *Ibidem* at pp. 83–94. Vierdag mentions two situations, however, in which ESCR are, according to him, enforceable. He states that those ESCR which are immediately available at no cost are enforceable. He mentions the examples of trade union freedom and the right to strike. (See at p. 86 and p. 102.) Furthermore, he states that those ESCR which demand expenses, which are contributed by potential beneficiaries of certain goods or services themselves on a proportionate basis are, likewise, enforceable, though only by those persons who have actually made a contribution. As examples, he mentions the right to social security and the right to medical care. (See at pp. 102–103.)

[87] *Case "relating to certain aspects of the laws on the use of languages in education in Belgium" (Merits)*, Judgement of 23 July 1968, Publications of the European Court of Human Rights, Series A, Vol. 6.

[88] *Ibidem* at p. 31, para. 3. See Vierdag, 1978, pp. 86–91.

[89] See Vierdag, 1978, p. 93.

> [S]ocial rights are not directed at government action that can be described or defined in terms of law. The creation of social and economic conditions under which social rights can be enjoyed is—as yet—not describable in terms of law. In order to be a legal right, a right must be legally definable; only then can it be legally enforced, only then it can be said to be justiciable. All aspects of economic, social and cultural rights: elements, forms, goals, methods of implementation, and so on, are economic, social and cultural, not—as yet—legal.[90]

Vierdag argues that, in view of these realities, it has not been possible to formulate the provisions of the ICESCR as legal, *i.e.* judicially enforceable, rights. The individual cannot rely on them to judicially obligate the government to provide what these provisions "promise".[91]

On the basis that the ICESCR does not make available judicial remedies to aggrieved individuals and that its provisions are vaguely defined, Vierdag concludes that the provisions of the ICESCR do not reflect legal rights. To him this means that they do not constitute law. States incur no legal obligations to realise ESCR. He holds with regard to article 6 (the right to work), article 11 (the right to an adequate standard of living) and article 13 (the right to education) ICESCR that "the implementation of these provisions is a political matter, not a matter of law, and hence not a matter of rights".[92] He conceives what is laid down in these provisions not to be rights "but broadly formulated *programmes* for governmental policies in the economic, social and cultural fields".[93] He considers that the word "right" in the ICESCR "appears to be used as it often is in political programmes, viz., in a moral and hortatory sense".[94] He finally remarks that "[essentially] the rights granted by the International Covenant on Economic, Social and Cultural Rights are of such a nature as to be legally negligible".[95]

To the present writer, it does not make sense to argue that because provisions in a human rights treaty are not justiciable or are not precisely defined, states parties to such a treaty do not incur legal obligations. Ultimately, international agreements are *per se* intended to create legal obligations for states parties thereto. It is quite remarkable to view the implementation of provisions of the ICESCR as constituting a political and not a legal matter. Treaties must be accepted to constitute "the most unambiguous and reliable source of international law".[96] The provisions contained

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[90] *Idem.*
[91] *Ibidem* at pp. 93–94.
[92] *Ibidem* at p. 103.
[93] *Idem.*
[94] *Idem.*
[95] *Ibidem* at p. 105.
[96] Van Hoof, 1984, p. 99.

in a treaty must be taken to be legally binding.[97] Reference should be made to article 26 of the Vienna Convention on the Law of Treaties which reiterates the *pacta sunt servanda* principle. Article 26 states that treaties are binding upon the parties to them and must be performed by them in good faith.[98] Therefore, the ICESCR must be accepted to impose legally binding obligations on the state. The justiciability of its provisions and the preciseness of their definition cannot have a bearing on this conclusion.

It is, furthermore, submitted that the requirements Vierdag poses for the existence of rights of international law are based on an adverse comparison between national and international law. At the national level, it may, quite validly, be required that rights be justiciable and precisely defined. At the international level, however, these requirements should not be posed. International society is structured differently than national communities. International society is horizontally structured. There are no institutionalised legislative, executive or judicial processes. States themselves perform these functions. It is the exception rather than the rule that rights of international law can be enforced in a court of law. Likewise, rights of international law are often not defined with particular precision. However, these realities are generally not considered reasons to deny them the status of rights. It merely implies that such rights must be implemented through means other than by recourse to a judicial procedure and that their content needs to be ascertained as best as possible in accordance with the accepted interpretative processes of international law.[99]

The extent to which ESCR may be considered justiciable is a controversial question. This matter will be discussed under a separate heading at the end of this Chapter.[100] It must be appreciated, however, that the answer to this question cannot change the fact that the provisions of the ICESCR are legally binding.

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[97] *Idem.*

[98] See also the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights of 1987 (UN Doc. E/CN.4/1987/17), a document prepared by experts on ESCR, para. 1 of which states, "Economic, social and cultural rights are an integral part of international human rights law. They are the subject of specific treaty obligations in various international instruments, notably the International Covenant on Economic, Social and Cultural Rights". Para. 7 states, "States parties must at all times act in good faith to fulfil the obligations they have accepted under the Covenant". See also the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights of 1997, also prepared by experts on ESCR, para. 5 of which states in its first sentence, "As in the case of civil and political rights, the failure by a State Party to comply with a treaty obligation concerning economic, social and cultural rights is, under international law, a violation of that treaty".

[99] On this argument, see Van Hoof, 1984, pp. 100–101.

[100] See 3.5. *infra.*

4. *Arguments in Support of Economic, Social and Cultural Rights*

Two important arguments in support of ESCR may be advanced. The first argument concerns the notion that all human rights are interdependent and indivisible. The notion of interdependence gives expression to the observation that CPR can only be enjoyed if ESCR are realised and, conversely, that ESCR can only be enjoyed if CPR are realised. In view of this observation, it is argued that if CPR are recognised as human rights, so must be ESCR. The implication is also that treaty obligations concerning CPR and ESCR should be treated on the same footing and with the same emphasis. The second argument concerns the concept that all human rights impose on the state duties to 1.) respect, 2.) protect and 3.) fulfil. This finding has been presented by human rights lawyers following a scientific analysis of the nature of CPR and ESCR. Premised on this finding, it is argued that if both CPR and ESCR entail the same types of state obligations, ESCR cannot be considered to differ fundamentally from CPR. Differences which exist between the two categories of rights must, then, be seen as differences of degree rather than differences in principle. Accordingly, treaty obligations concerning CPR and ESCR should be treated as being legally of equal importance.

4.1. *The Interdependence and Indivisibility of All Human Rights*

Those concerned with human rights have observed that CPR cannot be enjoyed if ESCR are not realised at the same time, and *vice versa*. Hence, the categories of rights are said to be interdependent. As regards the dependence of CPR on ESCR, the Inter-American Commission on Human Rights has made the following remark:

> Neglect of the economic and social rights is another cause, though more diffuse and problematic, of the violence and social conflicts. The general and apparently well-founded belief is that in some countries, the extreme poverty of the masses—the result in part of an inequitable distribution of the resources of production—has been the fundamental cause of the terror that afflicted and continues to afflict those countries . . . [T]he essence of the legal obligation incurred by any government in this area is to strive to achieve the economic and social aspirations of its people, by following an order that assigns priority to the basic needs of health, nutrition and education. The priority of the "rights of survival" and "basic needs" [ESCR] is a natural consequence of the right to personal security [CPR].[101]

[101] Annual Report of the Inter-American Commission on Human Rights, 1982–1983, pp. 36–37.

In effect, the Commission considers the implementation of ESCR to constitute a prerequisite for the realisation of CPR, notably the right to life.[102] On the basis of the appreciation that CPR and ESCR closely depend on each other, it has been argued that it does not make sense to accord CPR human rights status and ESCR not. It is held that both CPR and ESCR should be recognised as human rights. Equal attention and urgent consideration should be given to both groups of rights. The implication is also that treaty obligations concerning ESCR should not be considered less important than treaty obligations concerning CPR.

The notion of the interdependence and indivisibility of all human rights constitutes a fundamental principle in the protection of human rights within the framework of the UN.[103] It is inherent in the UDHR and has been reaffirmed in numerous subsequent UN documents. The standard phrase used is, "All human rights and fundamental freedoms are interdependent and indivisible".

Craig Scott considers the idea of interdependence to have two analytical components and also a social meaning.[104] As regards the analytical components, he distinguishes between "organic" and "related" interdependence.[105] "Organic interdependence" refers to the situation where two rights are linked in such a way that one is actually part of the other (*e.g.* the right of an infant to be protected from threats to his health that lead to infant mortality [an ESCR] as part of the right to life [a CPR]). "Related interdependence" refers to the situation where two rights are distinct but the one impacts beneficially on the other (*e.g.* the right to a fair trial [a CPR] has a beneficial impact on the protection of the right to social assistance [an ESCR], as it subjects the provision of such assistance to certain procedural guarantees, for example, access to an independent and impartial tribunal). As regards the social meaning of interdependence, Scott argues that the intimate relationship between all human rights has a potential grounding in social experiences, particularly those of the vulnerable in society.[106] In many ways, violations of their ESCR compromise their CPR

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[102] Likewise, see the discussion by Cassese, 1991, pp. 141–145 of the admissibility decision of the European Commission of Human Rights in the case of *Francine van Volsem v. Belgium* (Application No. 14641/89, *Revue Universelle des Droits de l'Homme*, Vol. 2, 1990, pp. 384–385). Cassese holds that the Commission's decision shows that where a person's ESCR are violated by exposing him to humiliating economic and social conditions, this may also violate his right not to be subjected to torture or to inhuman or degrading treatment or punishment, a CPR, protected in art. 3 ECHR.

[103] On the notion that all human rights are interdependent and indivisible, see Arambulo, 1999, pp. 100–112.

[104] On Scott's ideas, see Scott, 1989, pp. 769–878 and Scott, 1999, pp. 633–660.

[105] See Scott, 1989, pp. 779–786.

[106] *Ibidem* at pp. 786–790.

as well (*e.g.* where a person is denied the right to education [as an ESCR], freedom of information, expression, assembly and association or the right to vote [CPR] amount to nothing as they all depend on a minimum level of education). Scott remarks further that, often, the term "interdependence" is used in a more general sense.[107] It is then used to suggest that all human rights in some way or another mutually reinforce each other.

The concept of the interdependence of all human rights emerges for the first time in the UDHR.[108] In the Preamble, reference is made to "a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want". Thus, both CPR and ESCR are considered important to achieve a just society. The UDHR further contains both CPR and ESCR, the former in articles 1 to 21, the latter in articles 22 to 27.

The international human rights Covenants treat CPR and ESCR differently *de facto*. This is borne out by the fact that two separate Covenants were drafted with different enforcement mechanisms, a well-developed enforcement mechanism for CPR and a weaker mechanism for ESCR. Nonetheless, the Covenants treat CPR and ESCR equally *de iure*, in as far as they emphasise the interdependence of the two categories of rights.[109] Resolution 421 (V) of the UN General Assembly (the so-called Unity Resolution),[110] which reflects the General Assembly's initial position that only one Covenant containing all human rights should be drafted, reaffirmed that all human rights are interdependent. Subsequently, Resolution 543 (VI) (the so-called Separation Resolution)[111] was adopted.[112] It provided that two separate Covenants should be drafted but stated that the Covenants were to be approved by the General Assembly simultaneously and were to be opened at the same time for signature and "in order to emphasise the unity of the aim in view and to ensure respect for and observance of human rights", both Covenants were required to contain as many similar provisions as possible.[113] The Covenants were, in fact, approved simultaneously and opened at the same time for signature and, as requested, related provisions in both Covenants were formulated in a corresponding manner, for example, article 1 of both Covenants on the right to self-determination, articles 2(2) and 3 ICESCR and articles 2(1), 3 and 26 ICCPR on the

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[107] See Scott, 1999, p. 636 note 10.

[108] See Arambulo, 1999, p. 101.

[109] It has been said in this regard that the international human rights Covenants evidence a "double status theory of rights". See Arambulo, 1999, p. 106.

[110] UNGA Resolution 421 (V) of 4 December 1950.

[111] UNGA Resolution 543 (VI) of 5 February 1952.

[112] On the interdependence of all human rights in the context of the Unity and Separation Resolutions and the two human rights Covenants, see Arambulo, 1999, pp. 104–107.

[113] UNGA Resolution 543 (VI), para. 1.

principles of non-discrimination and equal protection of the law, article 8 ICESCR and article 22 ICCPR on trade union rights, and article 13(3) ICESCR and article 18(4) ICCPR on parents' freedom of choice concerning the education of their children. Furthermore, both Covenants stress the interdependence of all human rights in their preambles.[114] It is notable, moreover, that neither Covenant protects only its particular group of rights.[115] The ICCPR, for example, provides in article 24(1) that every child is entitled to measures of protection by his family, society and the state. To the extent that these measures are of an economic, social and cultural nature, article 24(1) constitutes an ESCR. Article 24(1) envisages positive steps by the state. And, the ICESCR, for instance, protects in article 13(3) the right of parents to choose the school their children should attend and further their right to ensure their children's education in conformity with their own convictions. Article 13(4) protects the right of individuals and bodies to set up and operate private schools. These are CPR. The state's obligations are of a negative nature.[116]

Since the days of drafting the international human rights Covenants, the notion of the interdependence of all human rights has undergone further development.[117] The Proclamation of Teheran, adopted by the International Conference on Human Rights, held at Teheran, Iran from 22 April to 13 May 1968, states:

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[114] The preamble of the ICCPR states in part, "[I]n accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights . . .". The preamble of the ICESCR states in part, "Recognising that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights . . .".

[115] See Coomans, 1992, pp. 23–24.

[116] An interesting suggestion has been made by Scott, 1989, pp. 769–878. In view of the absence of an individual complaints procedure to the ICESCR and on the basis of the consideration that the rights of the ICCPR and the ICESCR are interdependent, he argues that the provisions of the ICESCR could be subjected to the individual complaints procedure of the ICCPR. This could occur by recourse to the notion of permeability. Permeability means "the openness of a treaty dealing with one category of human rights to having its norms used as vehicles for the direct and indirect protection of another treaty dealing with a different category of human rights". (See at p. 771.) Permeability is particularly relevant where the norms of different treaties overlap. Norms overlap "either implicitly as a product of the interpretative process or explicitly on the face of the textual provisions". (See at p. 771.) Scott mentions the example that art. 22(1) ICCPR on the right to freedom of association could be relied on to protect trade union rights and the right to strike, ESCR found in art. 8(1) ICESCR. (See at pp. 869–874.) In a similar vein, see Tomaševski, 1995, pp. 203–218.

[117] See Arambulo, 1999, pp. 107–110.

> Since human rights and fundamental freedoms are indivisible, the full realisation of civil and political rights without the enjoyment of economic, social and cultural rights is impossible.[118]

Subsequently, on 16 December 1977, the General Assembly adopted Resolution 32/130. It affirms the interdependence of all human rights with a specific allusion to the Proclamation of Teheran. In the resolution, the General Assembly undertakes to approach the future work of the UN on human rights by taking the following considerations into account:

> (a) All human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of both civil and political, and economic, social and cultural rights;
> (b) The full realisation of civil and political rights without the enjoyment of economic, social and cultural rights is impossible; the achievement of lasting progress in the implementation of human rights is dependent upon sound and effective national and international policies of economic and social development, as recognised by the Proclamation of Teheran of 1968; . . .[119]

The interpretation of interdependence in these documents has been criticised on the basis that "[o]nly the dependence of civil and political rights on economic and social rights receives attention".[120] Nothing was stated to the effect that ESCR depend on CPR. According to Scott, however, the dependence of CPR on ESCR was emphasised because the realisation of ESCR constituted a pressing concern at the time. In his eyes, paragraph 13 of the Proclamation of Teheran and article 1(b) of Resolution 32/130 were not meant to reflect an interpretation to the effect that CPR depend on ESCR but not *vice versa*.[121]

In the 1980s, then, the approach to the idea of interdependence became more balanced. To a large extent, this must be ascribed to the recognition of the human right to development.[122] In 1986, the General Assembly adopted the Declaration on the Right to Development.[123] The envisaged goal of the process of development, in terms of the Declaration, is the creation of circumstances in which all human rights can be enjoyed, whether CPR or ESCR.[124] The Declaration carefully avoids placing a priority on

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[118] Proclamation of Teheran, para. 13.
[119] Art. 1 Resolution 32/130.
[120] Donnelly, J., "Recent trends in UN human rights activity: Description and polemic", in: *International Organisations*, Vol. 35, 1981, p. 643.
[121] See Scott, 1989, pp. 815–819, particularly at p. 818.
[122] On the human right to development and the idea of interdependence, see Scott, 1989, pp. 822–826.
[123] UNGA Resolution 41/128 of 4 December 1986.
[124] Art. 1(1) states, "The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to

either category of rights. It emphasises that equal attention should be given to both groups of rights.[125] The right to development may be said to comprise all CPR and ESCR. It is, however, more than the mere sum of these rights. It is a synthesis right which allows a focus on the entire spectrum of human rights as an integrated whole.[126]

Ever since the adoption of the Declaration on the Right to Development, the balanced approach to the notion of interdependence has prevailed.[127] It is reflected in numerous international documents.[128] Notably, the approach is reflected in the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights, held at Vienna, Austria from 14 to 25 June 1993. The Declaration states:

> All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.[129]

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and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised".

[125] Art. 6(2) states, "All human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights". Art. 6(3) states, "States should take steps to eliminate obstacles to development resulting from failure to observe civil and political rights as well as economic, social and cultural rights".

[126] See Alston, 1981, p. 104 and Scott, 1989, pp. 822–823.

[127] Danilo Türk holds that one can today speak of a "unified approach" in the relationship between CPR and ESCR. See Türk, D., *Realisation of Economic, Social and Cultural Rights*, UN Doc. E/CN.4/Sub.2/1989/19 (Preliminary Report submitted by the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on Economic, Social and Cultural Rights).

[128] Resolutions affirming the interdependence of all human rights are adopted by the General Assembly on a fairly regular basis. See, for example, UNGA Resolutions 40/114 of 13 December 1985, 41/117 of 4 December 1986, 42/102 of 7 December 1987 and 43/113 of 8 December 1988. Reference may, further, be made to para. 3 of the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights of 1987 (UN Doc. E/CN.4/1987/17), prepared by experts on ESCR, which states, "As human rights and fundamental freedoms are indivisible and interdependent, equal attention and urgent consideration should be given to the implementation, promotion and protection of both civil and political, and economic, social and cultural rights". And, para. 4 of the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights of 1997, prepared by experts on ESCR, states, "It is now undisputed that all human rights are indivisible, interdependent, interrelated and of equal importance for human dignity. Therefore, states are as responsible for violations of economic, social and cultural rights as they are for violations of civil and political rights".

[129] Declaration, para. 5.

The interdependence of CPR and ESCR is also recognised in international case law on human rights.[130] The European Court of Human Rights, in the case of *Airey v. Ireland*,[131] stated as follows:

> Whilst the [European] Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. The Court therefore considers . . . that the mere fact that an interpretation of the Covenant may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no watertight division separating that sphere from the field covered by the Convention.[132]

The appreciation that CPR depend on ESCR and that ESCR, in turn, depend on CPR, goes to show that it does not make sense to accord only the one or the other category of rights the status of human rights. Neither group can be implemented without realising the other. Hence, both generations of rights need to be recognised as human rights. Equal attention should be given to both groups of rights. And, the legal obligations imposed on states by international agreements protecting ESCR should not be considered less important than those imposed by international agreements protecting CPR.

4.2. *State Obligations to Respect, Protect and Fulfil*

In view of the lack of clarity as regards the exact legal nature of ESCR, human rights lawyers, relatively recently, set out to study ESCR in a more scientific manner. Their approach was to consider both CPR and ESCR, but not to study them from the angle of rights but from that of state obligations. The question they asked was, what types of state obligations

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[130] On how the right not to be discriminated against, a CPR, protected in art. 26 ICCPR, may be relied on to protect the right to social security, an ESCR, see the decisions of the Human Rights Committee in the cases of *F.H. Zwaan-de Vries v. the Netherlands* (HRC, Communication No. 182/1984, 09/04/1987, UN Doc. CCPR/C/29/D/182/1984) and *S.W.M. Broeks v. the Netherlands* (HRC, Communication No. 172/1984, 09/04/1987, UN Doc. CCPR/C/29/D/172/1984). And, on how the right to a fair trial, a CPR, protected in art. 6(1) ECHR, may be relied on to protect the right to social security, see the decisions of the European Court of Human Rights in the cases of *Feldbrugge v. the Netherlands* (Judgement of 29 May 1986, Publications of the European Court of Human Rights, Series A, Vol. 99), *Deumeland v. Germany* (Judgement of 29 May 1986, Publications of the European Court of Human Rights, Series A, Vol. 100), *Salesi v. Italy* (Judgement of 26 February 1993, Publications of the European Court of Human Rights, Series A, Vol. 257–E) and *Schuler-Zgraggen v. Switzerland* (Judgement of 24 June 1993, Publications of the European Court of Human Rights, Series A, Vol. 263).

[131] *Airey v. Ireland*, Judgement of 9 October 1979, Publications of the European Court of Human Rights, Series A, Vol. 32.

[132] *Ibidem* at para. 26.

do CPR and ESCR, respectively, entail? They found that both categories of rights, in fact, entail the same types of state obligations, namely 1.) obligations to respect, 2.) obligations to protect and 3.) obligations to fulfil. Quite evidently, these findings undermine the argument that ESCR differ fundamentally from CPR. They go to show that the differences which exist between the two categories of rights must be seen as differences of degree rather than differences in principle. Accordingly, treaty obligations concerning CPR and ESCR should be treated as being legally of equal importance.[133]

Henry Shue was the first who analysed the state obligations entailed by human rights. Shue discusses what he calls "basic rights".[134] He considers the issue of a moral minimum to justify the existence of such rights.[135] Basic rights can be divided into security rights, on the one hand, and subsistence rights, on the other. Security rights are those basic rights which relate to the individual's "physical security".[136] Security rights generally correspond to what are termed CPR in this book. Subsistence rights are basic rights to "minimum economic security" and they comprise "unpolluted air, unpolluted water, adequate food, adequate clothing, adequate shelter, and minimal preventative public health care".[137] Subsistence rights generally correspond to what are termed ESCR in this book, understood in a minimal sense, though. Both security and subsistence rights are essential for the enjoyment of other or more extensive rights.

Shue continues that each individual basic right entails three types of correlative duties: 1.) duties to avoid depriving, 2.) duties to protect from depriving and 3.) duties to aid the deprived.[138]

Security rights, therefore, entail the following:

1. duties not to eliminate a person's security;
2. duties to protect people against deprivation of security by other people; and
3. duties to provide for the security of those unable to provide for their own.[139]

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[133] On the concept that all human rights impose on the state duties to 1.) respect, 2.) protect and 3.) fulfil, see Arambulo, 1999, pp. 114–129.
[134] Shue, 1980. See the discussion of Shue's views by Arambulo, 1999, pp. 114–120.
[135] Shue, 1980, p. 7.
[136] *Ibidem* at pp. 21–22.
[137] *Ibidem* at p. 23.
[138] *Ibidem* at p. 52.
[139] *Ibidem* at pp. 52–53.

And, subsistence rights entail the following:

1. duties not to eliminate a person's only available means of subsistence;
2. duties to protect people against deprivation of the only available means of subsistence by other people; and
3. duties to provide for the subsistence of those unable to provide for their own.[140]

The first type of duties is of a negative nature. It entails that the state should refrain from acting in ways which deprive individuals of security or subsistence. The second type of duties is of a positive nature and refers to the duty of the state to take measures to protect individuals against threats to their security or subsistence by other individuals. The most demanding type of duties is the third type. It is of a positive nature and requires the state to aid the vulnerable in society and also those who have become victims where the state has failed to fulfil duties of the first or second type.[141]

In 1984, the UN University in Tokyo, Japan carried out a research project on the right to food.[142] The project also focused on the nature of state obligations in relation to the right to food. In a joint contribution by Philip Alston and Asbjørn Eide, a typology of state obligations is presented, applicable to CPR and ESCR, which includes obligations to respect, protect, and assist and fulfil.[143] The *obligation to respect* requires the state to refrain from unduly interfering with the individual's freedom or his resource base, in order that he may be able to take care of his own needs.[144] The *obligation to protect* entails that the state must protect the individual's freedom and his resource base against unwarranted interference by third parties.[145]

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[140] *Idem.*

[141] *Ibidem* at pp. 55–60.

[142] The results of this research project have been published in Eide, A., W. Barth Eide, S. Goonatilake, J. Gussow and Omawale (eds.), *Food as a Human Right*, Tokyo: The UN University, 1984. Concerning the research project, see Arambulo, 1999, p. 121.

[143] See Alston and Eide, 1984, pp. 249–259.

[144] *Ibidem* at pp. 252–253.

[145] *Ibidem* at pp. 253–254. On the notion of a state's "duty to protect", see Viljanen, 1994, pp. 55–59. See also the following two cases decided by the European Court of Human Rights: In the case of *X and Y v. the Netherlands* (Judgement of 26 March 1985, Publications of the European Court of Human Rights, Series A, Vol. 91), the Court stated with regard to art. 8(1) ECHR on the right to privacy (a CPR) that "there may be positive obligations inherent in an effective respect for private or family life" and that "these obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves". (See at para. 23.) In another case, *Plattform "Ärzte für das Leben"* (Judgement of 21 June 1988, Publications of the European Court of Human Rights, Series A, Vol. 139), where a demonstration had been disrupted by counter-demonstrators, the Court stated with regard to art. 11 ECHR on the right to freedom of assembly (a CPR) that although the right did not imply an

The *obligation to assist and fulfil* envisages that the state should assist the individual both in realising his right and in rendering aid in special circumstances.[146] Alston, in a separate contribution, adheres to Shue's terminology.[147] Eide, in a separate contribution, considers the state to have obligations to respect, protect and fulfil.[148]

A Conference on the Right to Food, organised by the *Studie- en Informatiecentrum Mensenrechten* of the University of Utrecht, the Netherlands in 1984, elaborated on Shue's typology of state obligations.[149] It introduced a typology of state obligations consisting of four duties:

1. the duty to respect;
2. the duty to protect;
3. the duty to fulfil or ensure; and
4. the duty to promote.

Van Hoof applied this four-part typology of state obligations in his contribution on the legal nature of ESCR.[150] The obligations to respect and to protect remain unchanged, as defined in the context of the research project of the UN University.[151] The *obligation to ensure*, in Van Hoof's view, "requires more far-reaching measures on the part of the government in that it has to actively create conditions aimed at the achievement of a certain result in the form of a (more) effective realisation of recognised rights and freedoms".[152] The *obligation to promote*, Van Hoof continues, "is also designed to achieve a certain result, but in this case it concerns more or less vaguely formulated goals, which can only be achieved progressively or in the long term".[153] The obligations to ensure and to promote, Van Hoof states, encompass what traditionally are called "programmatic" obliga-

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obligation to guarantee peaceful proceeding of demonstrations in an absolute manner, the state was required to take "reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully". (See at paras. 32 and 34.)

[146] See Alston and Eide, 1984, pp. 254–256.

[147] See Alston, 1984b, pp. 162–174.

[148] See Eide, 1984, pp. 152–161.

[149] The conference was entitled *The Right to Food: From Soft to Hard Law* and it was held at Utrecht, the Netherlands, from 6–9 June 1984. The results of this conference have been published in Alston, P. and K. Tomaševski (eds.), *The Right to Food*, Utrecht/Dordrecht: Studie- en Informatiecentrum (SIM) (Utrecht University)/Martinus Nijhoff Publishers, 1984. Concerning the conference, see Arambulo, 1999, pp. 121–126.

[150] See Van Hoof, 1984, pp. 97–110. Noteworthy is also the contribution of Alston, 1984a, pp. 9–68. At pp. 36–48, Alston discusses the following duty-holders with regard to the right to food: 1. the state in respect of its domestic duties, 2. the state in respect of its external duties, 3. individuals and 4. the international community.

[151] See Van Hoof, 1984, p. 106.

[152] *Idem.*

[153] *Idem.*

tions.[154] Van Hoof, in effect, attempts to refine Eide's suggested tri-partite typology of state obligations. The obligation to ensure, in his proposal, coincides with Eide's obligation to fulfil. Additionally, however, he introduces the obligation to promote. It enjoins the state to progressively realise long-term goals. Fons Coomans[155] considers the obligation to promote not adding an extra dimension to the obligation to ensure. He maintains that the obligation to fulfil already contains the idea that the realisation of some rights requires a long-term policy and can occur only progressively.[156]

The nature of a state's obligations in complying with human rights was further dealt with by Asbjørn Eide, as Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on the Right to Food. In 1987, he submitted his final report on the subject.[157] In his report, Eide applied his tri-partite typology of state obligations to respect, protect and fulfil.[158] The *obligation to respect* "requires the State, and thereby all its organs and agents, to abstain from doing anything that violates the integrity of the individual or infringes on her or his freedom, including the freedom to use the material resources available to that individual in the way she or he finds best to satisfy the basic needs".[159] The *obligation to protect* "requires from the State and its agents the measures necessary to prevent other individuals or groups from violating the integrity, freedom of action, or other human rights of the individual—including the prevention of infringement of the enjoyment of his material resources".[160] The *obligation to fulfil* "requires the State to take the measures necessary to ensure for each person within its jurisdiction opportunities to obtain satisfaction of those needs, recognised in the human rights instruments, which cannot be secured by personal efforts".[161]

These definitions differ in certain respects from the 1984 definitions.[162] The 1987 definitions place more emphasis on the aspect of individual freedom. By doing so, they "focus . . . on a feature of human rights, which is

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[154] *Idem.*

[155] See Coomans, 1992, p. 32.

[156] The major change introduced by the conference concerned Shue's duty to aid. It was replaced by the two duties to fulfil or ensure, and to promote. Shue himself has criticised this change. See Shue, 1984, pp. 83–95, in particular at pp. 85–86.

[157] See Eide, A., *The New International Economic Order and the Promotion of Human Rights: Report on the Right to Adequate Food as a Human Right*, UN Doc. E/CN.4/Sub.2/1987/23 (Final Report submitted by the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on the Right to Food). The report has been published as *Right to Adequate Food as a Human Right*, New York: UN, 1989 (UN Sales No. E.89.XIV.2). Concerning the report, see Arambulo, 1999, pp. 126–129.

[158] See Eide, 1989b, para. 66.

[159] *Ibidem* at para. 67.

[160] *Ibidem* at para. 68.

[161] *Ibidem* at para. 69.

[162] See Arambulo, 1999, p. 127.

generally and unequivocally accepted, *i.e.* the freedom and integrity of the individual, rather than on the material resource aspect, which is one of the main arguments against endowing both groups of human rights with an equal status".[163] With regard to the obligation to fulfil, it is to be noted that, whereas the 1984 definitions emphasised the aspect of assistance, the 1987 definition highlights the individual's ultimate responsibility for securing his own needs, the state's obligation being to create the necessary framework to enable the individual to secure his own needs.[164] Eide himself states that a realistic understanding of state obligations requires that the individual must be seen as the active subject of all economic and social development.[165] The individual must, whenever possible, try to satisfy his needs through his own efforts and by use of his own resources.[166]

All in all, the consensus these days is that both CPR and ESCR entail the same types of state obligations: obligations to respect, protect and fulfil. Paragraph 6 of the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, a document prepared by a group of experts on ESCR, states, "Like civil and political rights, economic, social and cultural rights impose three different types of obligations on States: the obligations to respect, protect and fulfil".[167] An example as regards each category of rights should be mentioned to illustrate this. The right to life, a CPR, requires the state not to cause any person's death (obligation to respect). It is also generally agreed that the right to life obliges the state to criminalise abortion in certain instances so as to protect the unborn against violations of its rights by third parties (obligation to protect). And, General Comment No. 6 of the Human Rights Committee states that the right to life

> cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures. In this connection, the Committee considers that it would be desirable for States parties to take all

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[163] *Idem.*

[164] *Idem.*

[165] See Eide, 1995, pp. 36–37. He refers to the Declaration on the Right to Development in this regard. Art. 2(1) thereof states, "The human person is the central subject of development and should be the active participant and beneficiary of the right to development".

[166] The draft of the UDHR prepared under the auspices of the American Law Institute in 1942–1944 contained a provision on the right to food in art. 41, the commentary on which stated, "The state is not required to provide food and housing unless the individual under existing conditions cannot obtain them through his own effort".

[167] Para. 6 of the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights of 1997 defines the different types of obligations in the context of ESCR as follows: The obligation to respect "requires States to refrain from interfering with the enjoyment of economic, social and cultural rights". The obligation to protect "requires the State to prevent violations of such rights by third parties". The obligation to fulfil "requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realisation of such rights".

> possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.[168]

This implies an obligation to fulfil. The Committee on Economic, Social and Cultural Rights has produced a General Comment on the right to housing, an ESCR.[169] Paragraph 18 thereof states that

> the Committee considers that instances of forced eviction are *prima facie* incompatible with the requirements of the Covenant and can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law.

Hence, states have an obligation not to undertake forced evictions. This implies an obligation to respect. On the issue of affordability of housing, the Committee states that "tenants should be protected by appropriate means against unreasonable rent levels or rent increases" (obligation to protect).[170] It also states that "[s]tates parties should establish housing subsidies for those unable to obtain affordable housing, as well as forms and levels of housing finance which adequately reflect housing needs" (obligation to fulfil).[171]

State obligations to fulfil are the most difficult to comprehend. They may require immediate action on the part of states. More often, however, state obligations to fulfil are to be realised *progressively*. In this context, note should be taken of article 2(1) ICESCR. Article 2(1) obliges states parties to the ICESCR to realise Covenant rights progressively, in accordance with the resources they have at their disposal. The nature and scope of article 2(1) will be discussed in detail in a subsequent Chapter.[172] The fact that the notion of progressiveness usually applies to obligations to fulfil, makes it clear that ESCR cannot be regarded as being identical with comprehensive welfare schemes. They do not grant claims to benefit from the services of a full-fledged welfare state. Obligations to fulfil need further only be realised within the confines of the political and economic system chosen by a particular state party, also in the case of ESCR.[173]

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[168] HRC, General Comment No. 6 (Sixteenth Session, 1982) Article 6 ICCPR [*Compilation*, 2004, pp. 128–129], para. 5.

[169] CESCR, General Comment No. 4 (Sixth Session, 1991) [UN Doc. E/1992/23] The right to adequate housing (art. 11(1) ICESCR) [*Compilation*, 2004, pp. 19–24].

[170] *Ibidem* at para. 8.

[171] *Idem*.

[172] See 9.2. *infra*.

[173] See in this regard para. 6 of the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights of 1987 (UN Doc. E/CN.4/1987/17), prepared by experts on ESCR, which states, "The achievement of economic, social and cultural rights may be realised in a variety of political settings. There is no single road to their full realisation. Successes and failures have been registered in both market and non-market economies, in both centralised and decentralised political structures".

CPR and ESCR entail the same types of state obligations. It may, therefore, be concluded that the assertion that ESCR differ from CPR on the account that the former are negative and cost no money, whereas the latter are positive and do cost money, is not quite correct. The assertion is true only if the focus is on the third level (the obligation to fulfil) of ESCR and on the first level (the obligation to respect) of CPR.[174] Differences which do exist between the two categories of rights are differences of degree rather than differences in principle. Generally, in the case of CPR, obligations of the first type are more prominent, whereas, in the case of ESCR, this is so for obligations of the third type. For the rest, however, CPR and ESCR have much in common. CPR and ESCR should thus be treated with equal respect. Treaty obligations concerning CPR and ESCR should be regarded as being of the same legal significance.

5. *The Justiciability of Economic, Social and Cultural Rights*

The above discussion has demonstrated that provisions on ESCR in international human rights agreements must be considered to impose on states legally binding obligations. It has also been stated that the justiciability of a treaty provision cannot be held to have a bearing on this conclusion.[175] This having been said, it is, nevertheless, not out of place to examine whether or not ESCR are, in fact, justiciable. ESCR are often believed to be *per se* injusticiable. This may be disputed, however.[176]

The justiciability of ESCR has been commented on in the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights,[177] a document prepared by a group of experts on ESCR, and in General Comment No. 3[178] of the Committee on Economic, Social and Cultural Rights. Paragraph 8 of the Limburg Principles states that "[a]lthough the full realisation of the rights recognised in the [ICESCR] is to be attained progressively, the application of some rights can be made justiciable immediately while other rights can become justiciable over time". Paragraph 5 of General Comment No. 3 states that some rights of the ICESCR "would seem to be capable of immediate appli-

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[174] See Eide, 1995, p. 38.

[175] See 3.3.3. *supra*.

[176] On the justiciability of ESCR, see Hunt, 1996, pp. 24–31. Interesting views on justiciability are also those of Addo, 1992, pp. 93–117.

[177] The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights of 1987 (UN Doc. E/CN.4/1987/17).

[178] CESCR, General Comment No. 3 (Fifth Session, 1990) [UN Doc. E/1991/23] The nature of States parties' obligations (art. 2(1) ICESCR) [*Compilation*, 2004, pp. 15–18].

cation by judicial and other organs in many national legal systems". It mentions the following examples: the enjoyment of Covenant rights without discrimination, the equal right of men and women to the enjoyment of ESCR (article 3), equal remuneration for work of equal value (article 7(a)(i)), the right to form and join trade unions and the right to strike (article 8), special measures of protection on behalf of children (article 10(3)), compulsory and free primary education (article 13(2)(a)), the liberty of parents to choose for their children non-public schools and to ensure the religious and moral education of their children in conformity with their own convictions (article 13(3)), the liberty of individuals and bodies to establish and direct educational institutions (article 13(4)) and the freedom indispensable for scientific research and creative activity (article 15(3)). The above documents consider, therefore, that certain ESCR are already justiciable, whereas others are realisable to such an extent that they can also be adjudicated upon.

A justiciable issue is one which is susceptible to judicial or quasi-judicial determination.[179] Justiciability involves two questions: firstly, should the adjudicator act and, secondly, can the adjudicator act?[180] The first question concerns the aspect of legitimacy. It enquires which matters it is legitimate for judges to decide upon. The consensus is that judges should not decide on matters of policy. Policy decisions are political in nature and should, accordingly, be assigned to those organs of government which are elected and, hence, accountable. They should, therefore, be entrusted to the legislative and executive branches of government, and not an unelected and unaccountable judiciary. If the judiciary were allowed to decide on policy matters, it would, in fact, usurp the powers of the legislature and the executive. This would violate the doctrine of the separation of powers, which is highly cherished in democratic states. The second question concerns the aspect of institutional competence. The enquiry here is which matters judges can be expected to decide upon by virtue of their legal training. Obviously, judges should only decide on matters with regard to which they possess the necessary expertise. For this reason, it is generally agreed that judges should only decide on matters of law. This means rights, duties and remedies which are clearly defined by law. Consequently, judges should not decide on matters of policy, as, in this case, rights, duties and remedies are altogether uncertain.

Both dimensions of justiciability may be addressed by drafting precise, narrow standards.[181] "The legitimacy dimension of justiciability is less likely

[179] See Hunt, 1996, pp. 24–25.
[180] *Ibidem* at p. 25.
[181] *Ibidem* at pp. 25–26.

to be offended if such norms keep adjudicators' policy choices within acceptable bounds. Precise standards are also likely to enhance the institutional competency of third-party adjudicators".[182]

Certain ESCR or certain aspects thereof may be rendered judicially enforceable, if states adopt legislation which elaborates on those rights or aspects. Legislation may, for example, grant food, clothing or housing allowances to individuals in clearly defined circumstances.[183] It may create social or medical benefit schemes.[184] It may establish a fellowship system to assist students from lower income groups to attend school or university.[185] Such legislation can regulate in all detail necessary when an entitlement accrues to an individual. On the basis of such legislation, courts can pass judgement on claims raised by individuals, without having to decide on major policy issues.

Legislation may also be adopted to regulate the economic and social relationship between individuals themselves. Legislation may, for example, formulate precise labour standards with the aim of affording better protection of workers' rights. Such legislation may give content to concepts, such as fair wages, safe and healthy working conditions, and reasonable limitation of working hours.[186] Similarly, legislation may lay down minimum educational standards for private schools in order to protect students at such schools against the capriciousness of those who establish and direct them.[187] Any legislation so adopted "becomes manageable for judicial review, and therefore belies the argument that economic and social rights are inherently non-justiciable".[188]

It has been stated above that ESCR, like CPR, comprise, amongst others, obligations to respect. At this level, the state's duty is negative. No legislative or administrative action is required by the state. The state must simply refrain from unduly interfering with the individual's rights. No decisions on policy issues need, therefore, to be taken. Consequently, in this respect, ESCR are fully justiciable. For example, where article 13(2)(c) ICESCR states that "[h]igher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education", it would be wholly unproblematic for a court to find that government action in terms

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[182] *Ibidem* at p. 25.
[183] Implementation of art. 11 ICESCR on the right to an adequate standard of living.
[184] Implementation of art. 9 ICESCR on the right to social security and art. 12 ICESCR on the right to health.
[185] Implementation of art. 13(2)(e) ICESCR.
[186] Implementation of art. 7 ICESCR on the right to fair conditions of employment.
[187] Implementation of art. 13(4) ICESCR.
[188] Eide, 1995, p. 37.

of which fees for higher education are introduced or increased, *prima facie* violates this provision. The government can escape responsibility only if it is able to justify its action in terms of the ICESCR.

The justiciability of ESCR with regard to state obligations to protect and fulfil is more complicated. But, even at these levels, ESCR may be justiciable. General Comment No. 3, as has been stated above, considers article 10(3) ICESCR on special measures of protection on behalf of children and article 13(2)(a) ICESCR on compulsory and free primary education justiciable. In the eyes of the Committee on Economic, Social and Cultural Rights, articles 10(3) and 13(2)(a) are specific enough to be justiciable. It is not impossible, therefore, that treaty provisions on ESCR which impose positive duties on states may be held to be sufficiently precise to be justiciable.

But, there is another way in which state obligations to protect and fulfil may be justiciable. Three arguments are usually raised against the justiciability of ESCR.[189] Firstly, there is the *expense argument*. It is argued that ESCR cost money to enforce and that they call for a decision on how to spend, but that judges should not make decisions on how money should be spend. Secondly, there is the *indeterminacy argument*. It is maintained that ESCR are inherently vague and indeterminate. They must be reduced to certainty and this entails hundreds of policy choices. Such choices should not be made by judges. And, thirdly, there is the *positiveness argument*. The argument is that the realisation of ESCR requires action rather than inaction. For this reason, enforcement cannot take the form of quashing government action. Instead, a remedy must be made available which chooses amongst various different methods of realisation. It is argued that the method should not be for judges to determine. All three objections reduce to the same allegation: that ESCR entail decisions on matters of policy and that judges lack the accountability and the expertise which would qualify them to decide such matters.

Etienne Mureinik holds that ESCR are justiciable in a way which respects these arguments.[190] He proposes that courts should be granted the competence to negatively review government action aimed at the realisation of ESCR. The court's task would be to judicially review government action for its sincerity and rationality. He considers that such an approach would make ESCR "what traditional judicial review makes [CPR]: standards against which to measure the justification of laws and decisions".[191] Mureinik's views may be illustrated with regard to the right to education. In view of

[189] These are briefly mentioned by Mureinik, 1992, pp. 465–468.
[190] See Mureinik, 1992, pp. 464–474.
[191] *Ibidem* at p. 474.

governments' commitment to realise the right to education, nothing inhibits a court from asking, as it might in respect of a CPR, whether a statute, an administrative act or the state budget, in so far as they relate to the realisation of the right to education, is justified. Mureinik states that

> [i]n answering that question, the court would of course be conscious that there are many theories about how [to realise the right to education], and that it is the government's prerogative to choose among them, just because it is politically accountable and it commands the necessary expertise. A court would never be entitled to interfere with a government's honest and rational programme . . . simply because it disapproved of the underlying political or economic theory. A court would be bound to respect all the government's choices, whether inspired by marxism or monetarism; whether social democratic or liberal. But the court would be entitled to ask the government to explain how it envisaged [to achieve the aim]. That in itself would improve the quality of government, because any decisionmaker who is aware in advance of the risk of being required to justify a decision will always consider it more closely than if there were no risk. A decisionmaker alive to that risk is under pressure consciously to consider and meet all the objections, consciously to consider and thoughtfully to discard all the alternatives, to the decision contemplated. And if in court the government could not offer a plausible justification for the programme that it had chosen—if it could not show a sincere and rational effort . . .—then the programme would have to be struck down.[192]

According to Mureinik, judicial review of the nature suggested respects all the arguments raised against the justiciability of ESCR. Judges do not make decisions on how to spend money, they do not reduce indeterminate rights to certainty and they do not make available remedies which call on the state to act in a particular positive manner. All this is left to the legislative and executive branches of government.[193] Judges do not make policy choices for which they lack accountability and expertise. They only review policy choices made by other organs of government.[194]

Next, Mureinik considers what would happen if a court quashed government action and the government then declined to bring forward a revised programme. Or, if the government did nothing at the outset, *i.e.* if it made no effort whatsoever to realise an ESCR. He suggests that in these circumstances

> [o]ne way would be to ask the court to declare the government in dereliction of its duty to make an honest and reasonable effort to realise an [ESCR]. If that did nothing else, it would often have an impact in the court of political justification: it would cost the government support in the next election.[195]

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[192] *Ibidem* at pp. 471–472.
[193] *Ibidem* at p. 474.
[194] *Ibidem* at p. 472.
[195] *Ibidem* at pp. 473–474.

Mureinik's views have been criticised. Dennis Davis argues that judicial review of CPR differs from judicial review of ESCR.[196] He holds that the judicial interpretation of CPR is much more predictable than that of ESCR because, in the case of CPR, background norms are generally uncontested, whereas, in the case of ESCR, no accepted background norms exist. He considers this to be the case, because disputes regarding ESCR "are no more than decisions on policy".[197]

Be that as it may, it is submitted that the above discussion on the justiciability of ESCR makes one thing clear, namely, that ESCR cannot be considered *inherently* injusticiable. Many states decide not to assign to their courts the responsibility of adjudicating on ESCR. This is not proof of the fact, however, that the nature of ESCR is such that they cannot be rendered judicially enforceable. It only shows that these states understand the judicial role within their particular constitutional systems in a way which excludes the judicial enforceability of ESCR. It has been stated that

> [t]o speak of economic, social and cultural rights as being non-justiciable *per se* is to suffer under a general misconception. The question whether a court has jurisdiction to consider a particular issue depends not only upon the nature of the issue itself, but upon an understanding of the constitutional role and function of the court concerned; this may, and indeed does, vary from State to State.[198]

Elsewhere it has been stated that

> "[j]usticiability" is a deceptive term because its legalistic tone can convey the impression that what is or is not justiciable inheres in the judicial function and is written in stone. In fact, the reverse is true: not only is justiciability variable from context to context, but its content varies over time.[199]

Consequently, arguments against ESCR based on the alleged injusticiability of this category of rights cannot be upheld. Naturally, such a finding strengthens the argument in support of ESCR as human rights. This is true, of course, also in as far as the right to education is concerned.

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[196] See Davis, 1992, pp. 475–490.
[197] *Ibidem* at p. 484.
[198] Craven, 1995, p. 28.
[199] Scott and Macklem, 1992, p. 17.

CHAPTER FOUR

THE PROTECTION OF THE RIGHT TO EDUCATION BY INTERNATIONAL LEGAL INSTRUMENTS

1. *General*

Now that arguments in support of the social aspect of the right to education and economic, social and cultural rights have been advanced, it is proposed to provide an overview of the protection of the right to education by instruments of international law. For present purposes, the term "instrument" refers to both treaties, which, as international agreements, legally bind states parties thereto, and to soft-law documents, such as resolutions, declarations or standard rules adopted by international bodies, which, although not binding in a legal sense, often bind in a "political" sense. Instruments which protect the right to education have been adopted at the international and regional levels. At the international level, instruments have generally been prepared by the UN. At the regional level, instruments have notably been prepared in the European, American and African contexts. Instruments at the international level include those adopted by the Specialised Agencies of the UN, presently the United Nations Educational, Scientific and Cultural Organisation (UNESCO) and the International Labour Organisation (ILO). The relevant provisions of the legal instruments will be briefly introduced in this and the following two Chapters. The present Chapter deals with the protection of the right to education by international instruments, the next Chapter with its protection by regional instruments, and the Chapter thereafter with its protection by instruments of the UN Specialised Agencies. The space available, unfortunately, only allows for a treatment which examines the most significant aspects of the various provisions. A few words will also be said on which body supervises each particular instrument and which supervisory procedures are available. It will be indicated whether there exists a system of state reports, of interstate petitions or of individual petitions, or a combination of such systems. *Reporting procedures* obligate states parties to an international instrument to prepare reports in which they set out the progress achieved and the difficulties experienced in implementing the provisions of the instrument. The reports are then examined by a supervisory organ which evaluates the reports and comments on the degree of realisation of the rights

protected in the instrument in states parties. The same organ may be competent to receive and consider interstate or individual petitions. *Interstate petition procedures* entitle states parties to complain that another state party does not fulfil its obligations under the instrument. *Individual petition procedures* entitle individuals to complain that their rights under the instrument are violated by a state party.[1]

2. *Introduction*[2]

Several legal instruments, adopted at the international level, contain provisions on the right to education. In the discussion below, the provisions on the right to education of the International Bill of Human Rights will be dealt with first. The International Bill of Human Rights consists of the Universal Declaration of Human Rights of 1948, the International Covenant on Civil and Political Rights of 1966 and the International Covenant on Economic, Social and Cultural Rights of 1966. Article 26 of the *Universal Declaration of Human Rights* recognises that everyone has a right to education. This constitutes the first ever recognition of a general right to education in an international instrument in explicit terms. Article 26 has subsequently been reaffirmed and made more detailed by articles 13 and 14 of the *International Covenant on Economic, Social and Cultural Rights*. Whereas article 13 generally recognises the right to education and lays down the general obligations of states parties in pursuing the realisation of the right to education, article 14 articulates specific state obligations with regard to primary education. Articles 13 and 14 are comprehensive provisions. In fact, they feature among the most elaborate rights provisions of the ICESCR. Articles 13 and 14 may be viewed as constituting a codification of the right to education in international law. Also the *International Covenant*

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[1] On the supervisory procedures provided by international human rights law, see, for example, chapter 25 by Scheinin, M., "International mechanisms and procedures for implementation", in: R. Hanski and M. Suksi (eds.), *An Introduction to the International Protection of Human Rights: A Textbook*, second edition, Åbo: Institute for Human Rights (Åbo Akademi University), 1999.

[2] For an overview of the protection of the right to education by international instruments, see Hodgson, 1998, pp. 39–56. See also Hodgson, 1996, pp. 240–249. See further Gomez del Prado, 1998, paras. 16–52 and 76–93 (UN Doc. E/C.12/1998/23). Many of the texts of provisions on the right to education in UN instruments may be found in the following compilations of international instruments containing provisions on the right to education: Fernandez, 1998 and Mashava, 2000. The texts of international instruments on human rights are available on the website of the Office of the UNHCHR (www.ohchr.org). See also the website of the Human Rights Library of the University of Minnesota (www1. umn.edu/humanrts/index.html). The texts of treaties, including those on human rights, are also contained in the UN Treaty Collection (http://untreaty.un.org/English/treaty.asp).

on Civil and Political Rights contains a provision relevant to the right to education. Article 18(4) of the Covenant protects the right of parents to ensure the religious and moral education of their children in accordance with their own convictions.

Many other legal instruments at the international level protect the right to education. In the discussion which follows on the analysis of the relevant parts of the International Bill of Human Rights, the various instruments have been grouped together so as to reflect the particular topic or the particular group of persons with regard to which the instruments were drafted. The provisions of the instruments in each group, which have a bearing on the right to education, will be studied briefly. In this way, the modalities of the right to education, as applicable in specific contexts or to specific vulnerable groups of persons, will become clearer.

The instruments have been divided into the following nine groups:

1. instruments providing protection against discrimination;
2. instruments on the rights of children;
3. instruments addressing the rights of refugee and stateless persons, of internally displaced persons, and of persons caught up in armed conflict;
4. instruments on the rights of migrant workers;
5. instruments on the rights of disabled persons;
6. instruments on the rights of older persons;
7. instruments on the rights of detained persons;
8. instruments on the rights of minorities; and
9. instruments on the rights of indigenous peoples.

In the first group, article 5 of the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* of 1981, article 3(1) of the *Declaration on the Elimination of All Forms of Racial Discrimination* of 1963, article 5(e)(v) of the *International Convention on the Elimination of All Forms of Racial Discrimination* of 1965, article 9 of the *Declaration on the Elimination of Discrimination against Women* of 1967 and article 10 of the *Convention on the Elimination of All Forms of Discrimination against Women* of 1979 will be referred to. The said provisions provide protection against discrimination in the field of education on the respective bases of religion, race and gender.

Human rights accrue, by definition, to every person. This does not mean, however, that their application to different categories of persons must occur in an identical manner. The application of human rights to a particular category of persons must take account of the special characteristics of that category.

The second group of instruments groups together instruments which deal with the rights of children. In this group, the provisions on the right to education of the *Declaration of the Rights of the Child* of 1959 and the *Convention*

on the Rights of the Child of 1989 will be addressed. The Declaration protects the right to education in Principle 7, the Convention in articles 28 and 29. The provisions of the Convention, like articles 13 and 14 ICESCR, may be said to constitute a codification of the right to education in international law.[3] Some of the provisions of the CRC have been formulated in weaker terms than those of the ICESCR. At the same time, however, the CRC introduces new elements which add to the protection of the right to education, as provided under the ICESCR.

In a similar way, instruments have been adopted to address the specific needs, including those of an educational nature, of refugee and stateless persons, of internally displaced persons, and of persons caught up in armed conflict. Article 22 of the *Convention Relating to the Status of Refugees* of 1951 and of the *Convention Relating to the Status of Stateless Persons* of 1954 concerns the educational rights of refugee and stateless persons, respectively. The educational rights of internally displaced persons are described in Principle 23 of the *Guiding Principles on Internal Displacement* of 1998. Relevant stipulations of the Geneva conventions on international humanitarian law outline the educational rights of persons caught up in armed conflict. Other instruments lay down the rights of migrant workers. Article 8 of the *Declaration on the Human Rights of Individuals Who are not Nationals of the Country in Which They Live* of 1985 and articles 12(4), 30, 43 and 45 of the *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families* of 1990 elaborate on the right to education as it accrues to migrant workers. Article 6 of the *Declaration on the Rights of Disabled Persons* of 1975, article 23 of the *Convention on the Rights of the Child* and Rule 6 of the *Standard Rules on the Equalisation of Opportunities for Persons with Disabilities* of 1993 describe the entitlements of disabled persons in the field of education. Principles 4, 7 and 16 of the *Principles for Older Persons* of 1991 describe the educational entitlements of older persons. Rule 77 of the *Standard Minimum Rules for the Treatment of Prisoners* does the same in respect of detained persons. Of particular concern are further the educational needs of persons belonging to national or ethnic, religious or linguistic minorities and those of persons of indigenous origin. Article 27 of the *International Covenant on Civil and Political Rights* and article 30 of the *Convention on the Rights of the Child* and aspects of articles 2 and 4 of the *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities* of 1992 are relevant when it comes to the educational needs of minorities. Articles 15, 16 and 31 of the *Draft Declaration on the Rights of Indigenous*

[3] The same may be said of the Convention against Discrimination in Education, adopted by UNESCO in 1960, in its entirety. The Convention will be discussed at 6.2.2.1. *infra.*

Peoples, in turn, are relevant in as far as the educational needs of indigenous peoples are concerned. Mention may also be made of the Convention concerning Indigenous and Tribal Peoples in Independent Countries of 1989. Part VI of the Convention is devoted to the educational rights of indigenous peoples. The instrument has been adopted by the International Labour Organisation and will, therefore, be dealt with in Chapter 6.[4]

The discussion of legal instruments adopted at the international level concludes with a reference to a few other declarations adopted by the UN General Assembly which comment on matters of educational concern.

3. *The International Bill of Human Rights*

At the international level, a clear commitment to protect human rights is encountered for the first time in the *Charter of the United Nations* of 1945.[5] Article 1(3) UN Charter mentions as one of the purposes of the UN ". . . international co-operation . . . in promoting and encouraging respect for human rights and for fundamental freedoms . . .". Article 55(c) obligates the UN to promote ". . . universal respect for, and the observance of, human rights and fundamental freedoms . . .". Article 56, then, enjoins member states ". . . to take joint and separate action in co-operation with the [UN] . . ." for the achievement of such respect and observance. The Charter does not by itself guarantee a right to education.[6] It provides the basis, however, for its subsequent protection by the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (1966) and the International Covenant on Economic, Social and Cultural Rights (1966), and other human rights instruments. The UDHR, the ICCPR and the ICESCR constitute what is commonly termed the "International Bill of Human Rights". The International Bill of Human Rights provides extensive protection for the right to education. Its provisions on the right to education will now be examined.

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[4] See 6.3.2.3. *infra*.

[5] Charter of the United Nations (1945) 1 UNTS xvi, entered into force on 24 October 1945. See Hodgson, 1992, pp. 261–262 and Hodgson, 1998, pp. 39–40. See also Stavrinides, Z., "Human rights obligations under the United Nations Charter", in: *International Journal of Human Rights*, Vol. 3, No. 2, 1999, pp. 38–48. Stavrinides analyses the human rights obligations under the UN Charter by examining arts. 1(3), 55(c), 76(c), 13(1)(b), 62(2) and 68.

[6] Reference may, however, be made to art. 55(b) UN Charter, which requires the UN to promote ". . . solutions of international economic, social, health, and related problems; and international cultural and *educational* co-operation . . ." [author's italics].

3.1. *The Universal Declaration of Human Rights*

A right of everyone to education was articulated for the first time, in an international instrument, in article 26 of the *Universal Declaration of Human Rights* (UDHR).[7] The UDHR was adopted by the UN General Assembly on 10 December 1948[8] to give content to the notion of "human rights" in the UN Charter.[9] As a resolution of the General Assembly, the UDHR is of a non-binding nature. Article 26 states:

> 1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.
> 2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.
> 3. Parents have a prior right to choose the kind of education that shall be given to their children.

Article 26(1) comprises various elements:

- It provides for the right of every person to education.
- Elementary and fundamental education must be free. Whereas elementary education refers to formal schooling for children of primary school age, fundamental education means education for children, youth and adults, who did not have the opportunity to undergo or complete primary education, and which is offered outside the regular primary education system.
- Elementary education must be compulsory.
- Technical and professional education must be made generally available. Technical and professional education refers to education which involves, in addition to acquiring general knowledge, the study of technologies and

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[7] On the protection of the right to education by the UDHR, see Lonbay, 1988, pp. 139–167, Arajärvi, 1992, pp. 405–410, Coomans, 1992, pp. 50–58, Hodgson, 1992, pp. 263–265, Gebert, 1996, pp. 19–25, Hodgson, 1996, p. 241, Gomez del Prado, 1998, para. 16 (UN Doc. E/C.12/1998/23) and Hodgson, 1998, pp. 40–41.

[8] UNGA Resolution 217A (III) of 10 December 1948.

[9] See the UDHR's allusion to art. 56 UN Charter, where it states in its preamble, ". . . Whereas Member States [of the UN] have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms . . . now, therefore, the General Assembly proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations . . .".

the acquisition of practical skills, know-how, attitudes and understanding relating to occupations in the various sectors of economic and social life. It is often seen as a particular form of secondary education but, in fact, forms part of all levels of education.

- Higher education must be equally accessible to all on the basis of merit. Higher education refers to all forms of tertiary education.[10]

Article 26(1) reflects the social aspect of the right to education.[11] It expects the state to attend positively to the realisation of the various levels of education.[12] Article 26(1) must be read in conjunction with article 22, which introduces the economic, social and cultural rights provisions of the UDHR. It states that "[e]veryone . . . is entitled to realisation, through national effort and international co-operation and in accordance with the organisation and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality". The words "effort" and "co-operation" connote action being taken rather than a passive attitude on the part of the state. In other words, the state must take deliberate steps towards realising the right to education. It must devote financial, technical and other resources, which are available nationally, or which may be obtained from international sources, to this end.

The realisation of the right to education, as does the realisation of economic, social and cultural rights generally, requires considerable resources. Many states, particularly those of the third world, lack the resources necessary to set up and maintain full-scale and all-inclusive systems of education. For this reason, article 22 refers to the individual's entitlement to the realisation of economic, social and cultural rights "in accordance with the . . . resources of each State", thereby subjecting the scope of the state's duty to the extent of the resources available.[13] As the state develops and as its resources increase, its obligations with regard to economic, social and cultural rights must, in the light of the increasing resource base, be interpreted ever more widely. The state's obligation is, therefore, one of *progressively* realising the right to education and other economic, social and cultural rights. The state is expected gradually to achieve the full realisation of these rights.

Generally, states have a wide latitude in determining how to go about realising the economic, social and cultural rights of the UDHR.[14] Applied to article 26(1), states may set priorities when it comes to implementing a

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[10] See also Coomans, 1992, p. 53.
[11] See *ibidem* at pp. 53–54.
[12] See *ibidem* at p. 50.
[13] See *ibidem* at p. 54.
[14] This is implied by art. 22 UDHR.

system of education.[15] It needs to be appreciated, however, that article 26(1) prioritises the realisation of education at the elementary level.[16] Note should be taken of the particular order in which the different levels of education are mentioned in the UDHR. First of all, elementary education is mentioned, then secondary and thereafter higher education. Elementary education must be compulsory and it must be free. The requirement of free education is not as strict where secondary and higher education are concerned. Article 26(1) requires that ". . . [e]ducation shall be free, *at least* in the elementary and fundamental stages . . .".[17] It is submitted that the implementation of elementary education in article 26(1) is subject to the notion of progressiveness to a far lesser extent than that of secondary and higher education. It will be difficult, therefore, for a state to discharge the onus of proving that it has not complied with its duty of realising elementary education because of a scarcity of resources.

Article 26(2) sets out the aims of education. It mentions:

1. the full development of the human personality;
2. the strengthening of respect for human rights and fundamental freedoms;
3. the promotion of understanding, tolerance and friendship among all nations, racial and religious groups; and
4. the furtherance of the activities of the UN for the maintenance of peace.

The full development of the human personality constitutes the general ethical aim of education. The human personality covers all dimensions of the human being: physical, intellectual, spiritual, psychological and social.[18] Education must *strengthen respect for human rights and fundamental freedoms*. It has been stated that this requires at least an education that is not in contradiction with the UDHR.[19] The stipulation that education must *promote understanding, tolerance and friendship among all nations, racial and religious groups* is a call for education which develops attitudes based on recognition of the equality and interdependence of nations and peoples. It is also a call for pluralism in education. Education should allow different views to coexist side by side. The content of education must also take into consideration the principles of the UN Charter. These include, amongst others, *the maintenance of peace* and security, friendly relations among nations, and international co-operation in solving international problems.[20]

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[15] See Coomans, 1992, p. 54.
[16] See *idem*.
[17] Author's italics.
[18] See Arajärvi, 1992, p. 409.
[19] See *idem*.
[20] See art. 1 UN Charter.

Article 26(3) guarantees "[the] prior right [of parents] to choose the kind of education that shall be given to their children". Article 26(3) reflects the freedom aspect of the right to education.[21] The state must respect parents' convictions concerning the nature of education which their children should receive. Parents' convictions regarding the ethical, philosophical and religious principles of education and also regarding the educational methods must be respected.[22] The UDHR's *travaux préparatoires* show that article 26(3) further protects the right of parents to choose the school which their children should attend.[23] There also exists a right to establish and direct private educational institutions. The education provided at such institutions must, however, conform to the minimum standards laid down by the state.[24] The notion of a "prior right" means that the right accrues to parents in the first place. The state's role in this respect is of a subsidiary nature. Parents are accorded a "prior right", so that pluralism may prevail in education. If parents were not accorded such a right, it would be no difficult feat for the state to promote its political and philosophical ideas in education. The *raison d'être* of article 26(3) is to provide protection against state indoctrination.

Article 26 must further be read in conjunction with article 2. Article 2 states that "[e]veryone is entitled to all the rights and freedoms set forth in [the UDHR], without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". The right to education, therefore, accrues to every person on equal terms. At a minimum, this entails that nobody should be discriminated against in as far as access to education is concerned. The state must refrain from unfairly excluding any person from education on the basis of any of the criteria of distinction mentioned. In this sense, the right to education in its freedom aspect is concerned. Article 2 should, however, also be interpreted as entailing a duty for the state to take positive measures in respect of UDHR rights. With regard to article 26, this means that the state would have to adopt non-discrimination legislation in order to achieve formal equality in the exercise of the right to education. Preferably, however, the state should also be required to take steps aimed at realising a certain measure of substantive equality in the enjoyment of the right to education. This would compel the state to take steps to ensure equal opportunities and equal treatment for all in

[21] See Coomans, 1992, pp. 55–58.
[22] See Arajärvi, 1992, p. 410.
[23] See Coomans, 1992, p. 57 and the references cited there.
[24] Coomans, 1992, pp. 57–58 holds that the right to establish and direct private educational institutions necessarily follows from art. 26(3) UDHR.

the field of education. In this sense, the right to education in its social aspect is concerned.[25]

Finally, it needs to be pointed out that the right to education in article 26, as also the other rights in the UDHR, may be subjected to limitations, in accordance with article 29(2). Article 29(2) constitutes a general limitation provision. It stipulates that "[i]n the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society".

3.2. *The International Covenant on Economic, Social and Cultural Rights*

Article 26 UDHR has subsequently been made more detailed by article 13 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) of 1966.[26] The ICESCR is an international agreement which imposes legally binding obligations on states parties. Article 13 may arguably be viewed as the most important formulation of the right to education in an international agreement, and will for this reason form the basis of the discussion of the right to education in Part B of this book. At this juncture, some introductory remarks will be made on this significant provision. Article 13 provides as follows:

> 1. The States Parties to the present Covenant recognise the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.
> 2. The States Parties to the present Covenant recognise that, with a view to achieving the full realisation of this right:
>
> (a) Primary education shall be compulsory and available free to all;
>
> (b) Secondary education in its different forms, including technical and voca-

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[25] Coomans, 1992, p. 160 considers the non-discrimination principle to entail both a negative and a positive duty for the state. See also the discussion of Ferrer, 1998 (UN Doc. E/C.12/1998/20) on positive state programmes to remedy inequalities in education.

[26] International Covenant on Economic, Social and Cultural Rights (1966) 993 UNTS 3, entered into force on 3 January 1976. On the protection of the right to education by the ICESCR, see Lonbay, 1988, pp. 167–285, Coomans, 1992, pp. 93–124, Hodgson, 1992, p. 270, Yudof, 1993, pp. 235–245, Hodgson, 1996, p. 243 and Hodgson, 1998, pp. 41–44. Generally, see the doctoral thesis of Gebert, 1996.

tional secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;

(c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;

(d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;

(e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

Under article 13(1), states parties recognise every person's right to education. The provision proceeds to set out the aims of education. It repeats the aims mentioned in article 26(2) UDHR,[27] but makes two additions. Firstly, it refers to the development of the human personality and *the sense of its dignity*.[28] In terms of the preambles of the UDHR, the ICESCR and the ICCPR, human dignity constitutes the source of human rights. The reference to human dignity in article 13(1) appears, therefore, to require that education must make the individual aware of his own inherent worth and of the human rights which accrue to him on this basis. Secondly, it states that *education should enable all persons to participate effectively in a free society*.[29] This aim appears to require that education must not solely be theoretically oriented but that it must also teach students how to satisfy their practical needs in life.

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[27] Like art. 26(2) UDHR, art. 13(1) ICESCR mentions the following aims of education: 1. the full development of the human personality, 2. the strengthening of respect for human rights and fundamental freedoms, 3. the promotion of understanding, tolerance and friendship among various groups and persons and 4. the development of respect for the principles enshrined in the UN Charter. It should be noted that the ICESCR adds "ethnic groups" to the list of those among whom understanding, tolerance and friendship are to be promoted.

[28] On this aim, see Gebert, 1996, pp. 329–330.

[29] On this aim, see *ibidem* at p. 329.

Article 13(2) elaborates on article 26(1) UDHR. Article 13(2)(a) directs that primary education be compulsory and free to all, article 13(2)(b) that secondary education be made generally available and accessible to all and article 13(2)(c) that higher education be made equally accessible to all, on the basis of capacity. In the case of both secondary and higher education, accessibility is to be achieved "by every appropriate means, and in particular by the progressive introduction of free education". Article 13(2)(d) requires that fundamental education be encouraged or intensified as far as possible. In terms of article 13(2)(e), a system of schools at all levels must be developed, a fellowship system be established and the material conditions of teaching staff be improved.

Article 13(2) lays down state obligations with regard to the education system, which are defined by reference to the criteria of the availability and accessibility of education.[30] The *availability* of education relates to the state's duty to ensure that schools, teachers and teaching materials are available. Availability is improved by providing more schools, teachers and teaching materials. *General* availability means that schools, teachers and teaching materials must be available to all. The *accessibility* of education, in contrast, relates to the state's duty to maximise the individual's chances of gaining admission to the one or other school, once schools have been made available. It is improved by removing obstacles impeding admission. *General* accessibility thus means that all obstacles to admission must be eliminated so that education is accessible to all. School fees are often an obstacle to admission. The accessibility of education is hence promoted best by measures aimed at making education free. Another option would be to establish a fellowship system. Another obstacle to admission is discrimination.[31]

Article 13(2)(a) on primary education (elementary education in the UDHR) endorses the rigorous standard formulated in article 26(1) UDHR. Primary education must be compulsory and free to all. The requirement that primary education be compulsory implies that such education must be generally available. Primary education clearly can only be made compulsory if there are sufficient schools to take on all pupils. The requirement that primary education be free means that such education must be generally accessible. Once school fees have been abolished, the most important obstacle to admission has been eliminated. There is further a close correlation between compulsory education and free education. Education can only be

[30] For an analysis of art. 13(2) ICESCR in terms of the categories "availability" and "accessibility", see Gebert, 1996, pp. 355–360.

[31] See *ibidem* at p. 356 for a definition of the terms "availability of education" and "accessibility of education".

made compulsory, if it is also made free. After all, to compel somebody to attend a school he cannot afford, does not make sense.

Article 13(2)(b) states that secondary education must be made "generally available". In other words, there must ultimately be enough educational facilities available for all at the secondary level. Article 13(2)(c) does not make a statement on availability concerning higher education. The omission should not be read as exempting states parties from making higher education available. It only means that such education need not be made *generally* available.

Article 13(2)(b) states that secondary education must be made "accessible to all". Secondary education must be made generally accessible. Accessibility is to be achieved "by every appropriate means". It is for states parties themselves to decide which means they regard as appropriate. A particular means is prescribed, however, namely, "the progressive introduction of free education". Article 13(2)(c) states that higher education must be made "equally accessible to all, on the basis of capacity". Because states parties are not required to make higher education generally available, such education need also not be generally accessible. To determine which students should be admitted to institutions of higher education, the objective criterion of "capacity" has been laid down. The UDHR refers to the "merit" of the student. This criterion is backward-looking and emphasises the student's past academic achievements. The criterion of the "capacity" of the student, in contrast, is forward-looking and stresses the student's future potential.[32] For the rest, however, access to higher education must be unhampered. For this reason, article 13(2)(c) refers to higher education being "equally" accessible to all and expects states parties to achieve accessibility "by every appropriate means, and in particular by the progressive introduction of free education".

Article 13(2)(d) stipulates that fundamental education must be "encouraged or intensified as far as possible". Article 13(2)(d), in fact, obliges states parties to advance the availability and accessibility of fundamental education. They are directed to do so to the highest degree possible. This requires that substantial measures be taken to make such education available and accessible, but does not go as far as to require that fundamental education be made generally available and generally accessible. Unlike article 26(1) UDHR, article 13(2)(d) does not demand that fundamental education be free. Neither is there a reference to the progressive introduction of free education.

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[32] See Gebert, 1996, pp. 427–428 and the references there to the *travaux préparatoires* of the ICESCR.

Article 13(2)(e) is a new provision. It instructs states parties to do three things: they must, firstly, actively pursue the development of a system of schools at all levels, secondly, establish an adequate fellowship system and, thirdly, continuously improve the material conditions of teaching staff. The provision may be said to prescribe measures a state party must take to ultimately realise an education system as envisaged by article 13(2)(a) to (d), *i.e.* an education system which provides education which is available and accessible at all levels.

Article 13(2) embodies the social aspect of the right to education.[33] Article 13(2) must be read together with article 2(1) ICESCR.[34] Under this provision,[35] states parties to the Covenant must take steps, "individually" and "through international assistance and co-operation, especially economic and technical", ". . . to the maximum of [their] available resources, with a view to achieving progressively the full realisation of the rights [of the Covenant] . . .". Article 2(1), it will be noted, bears a strong resemblance to article 22 UDHR, dealt with above. States parties are instructed to take deliberate steps and to devote financial, technical and other resources, available nationally or obtained from international sources, towards the goal of realising the right to education. Again, implementation of (the social aspect of) the right to education is to take place on a progressive basis. Generally, states parties may freely determine the approach they consider suited to comply with their obligations. On the whole, article 13(2) read with article 2(1) should be read as entailing instructions to the state rather than as entailing actionable entitlements of the individual.[36]

The notion of progressiveness applies to primary education in a restrictive sense only, however. Article 13(2)(a) states in an imperative fashion that primary education "shall be" compulsory and free. This indicates that the duty of states parties concerning primary education is of an immediate rather than of a progressive nature. In contrast, article 13(2)(b) and (c) refer to the duty of states parties that secondary and higher education

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[33] See Coomans, 1992, pp. 95–107 and pp. 114–120.

[34] The wording of the ICESCR reflects obligations "to respect", obligations "to recognise" and obligations "to ensure/guarantee". Obligations "to respect" essentially imply abstention on the part of states parties. Obligations "to recognise" entail general state obligations under art. 2(1) ICESCR, *i.e.* positive state action, subject, however, to the notion of progressiveness. Finally, obligations "to ensure/guarantee" are stronger than obligations "to recognise". They demand of states parties immediate action. The notion of progressiveness does not apply in the case of these obligations. See Alston and Quinn, 1987, pp. 183–186. See also Coomans, 1995, pp. 12–16. Art. 13(2) ICESCR, it should be noted, uses the term "recognise". This triggers the application of state obligations under art. 2(1) ICESCR.

[35] Art. 2(1) ICESCR will be discussed in more detail at 9.2. *infra.*

[36] There are justiciable aspects to art. 13(2) ICESCR, though. The question of the justiciability of the right to education will be addressed at 9.2.2.5.2. and in Chapter 10 *infra.*

"shall be made" available and accessible. The use of the verb "to make" affirms the progressive nature of these provisions.[37] The urgent nature of the duty concerning primary education is reinforced by article 14 ICESCR. This provision stipulates:

> Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.

Article 14 guides state action in respect of the realisation of compulsory and free primary education. It effectively limits progressive realisation to two years plus additionally a reasonable number of years which must be clearly specified. By doing so, it confirms that the legal obligation contained in article 13(2)(a) is "stronger" than the other legal obligations under article 13(2).[38]

The structure of article 13(2) ICESCR is shown in the following diagram:[39]

	availability	*accessibility*
art. 13(2)(a) – primary education	must be compulsory (= generally available); where necessary, to be achieved by action in terms of art. 14	must be free (= generally accessible); where necessary, to be achieved by action in terms of art. 14
art. 13(2)(b) – secondary education	progressively to be made generally available	progressively to be made generally accessible, by every appropriate means, *inter alia* by the progressive introduction of free education
art. 13(2)(c) – higher education	no stipulation included (progressively to be made available)	progressively to be made equally accessible on the basis of capacity, by every appropriate means, *inter alia* by the progressive introduction of free education

[37] See Coomans, 1995, pp. 14–15.
[38] See *idem*.

Table (*cont.*)

art. 13(2)(d) – fundamental education	to be encouraged or intensified as far as possible (progressively to be made available)	to be encouraged or intensified as far as possible (progressively to be made accessible)
art. 13(2)(e) – educational infrastructure	progressively to be established	progressively to be established

Article 13(3) and (4) elaborate on article 26(3) UDHR. Article 13(3) obligates states parties to have respect for the liberty of parents or legal guardians, as the case may be, to choose for their children non-state schools which conform to such minimum educational standards as may be laid down or approved by the state. Under the same provision, states parties must further respect the liberty of parents or legal guardians to ensure the religious and moral education of their children in conformity with their own convictions. Article 13(4) protects the liberty of individuals and bodies to establish and direct educational institutions. The education provided at such institutions must, however, observe the aims of education enunciated in article 13(1) and it must conform to such minimum standards as may be laid down by the state.

Article 13(3) and (4) embody the freedom aspect of the right to education.[40] Article 13(3) covers *the freedom to choose*—to choose the modalities of education (school, content, method)—and accrues to parents. Article 13(4) covers *the freedom to establish*—to establish private schools—and accrues to natural and juristic persons. For the larger part, the provisions are of a negative character.[41] The state is denied the right to interfere in the sphere of education, as specified. Generally speaking, the realisation of the rights contained in article 13(3) and (4) does not require the state to make available resources. Also the idea of progressive implementation does not apply to these provisions. The nature of the rights is such that the state can guarantee them immediately. For these reasons, article 13(3) and (4) must be considered actionable at the instance of the individual.[42]

A number of other provisions of the ICESCR also have a bearing on the right to education. Article 6(2) calls upon states parties, in realising the

[39] The analysis of art. 13(2) ICESCR in terms of the categories "availability" and "accessibility" will be further refined at 10.4. *infra*, by the addition of the categories "acceptability" and "adaptability".

[40] See Coomans, 1992, pp. 107–114 and pp. 120–123.

[41] See Gebert, 1996, p. 570 and pp. 612–613.

[42] See Coomans, 1992, p. 158. The question of the justiciability of the right to education will be addressed at 9.2.2.5.2. and in Chapter 10 *infra*.

right to work, to devise and implement "technical and vocational guidance and training programmes". Technical and vocational education forms part of both the right to education and the right to work.[43] Article 10(1) proclaims that "[t]he widest possible protection and assistance should be accorded to the family . . . while it is responsible for the care and education of dependent children". Article 10(1) clearly recognises the role of parents as regards the upbringing and education of their children. The role of parents includes, amongst others, the rights articulated in article 13(3) and (4).

The provisions of the ICESCR on the right to education must further be read together with articles 2(2) and 3. Article 2(2) states, "The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". Article 3 states, "The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant".[44] The remarks made above, when article 26 UDHR was discussed, may be repeated here. At a minimum, the provisions entail that nobody should be denied access to educational institutions in a discriminatory manner. This concerns the right to education in its freedom aspect. The provisions, however, also entail a duty to take positive measures directed at achieving formal and substantive equality in the exercise of the right to education. This concerns the right to education in its social aspect.[45]

Note should further be taken of the fact that the rights in the ICESCR, also the right to education, may be subjected to limitations, in accordance with article 4.[46] Article 4 constitutes a general limitation provision. It allows the rights in the Covenant to be limited, but lays down that limitations are permissible only if, firstly, they are determined by law, secondly, they are compatible with the nature of the rights to be limited and, thirdly,

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[43] CESCR, General Comment No. 13 (Twenty-First Session, 1999) [UN Doc. E/2000/22] The right to education (art. 13 ICESCR) [*Compilation*, 2004, pp. 71–86], para. 15.

[44] On non-discrimination and equality in the context of the ICESCR, see Craven, 1995, pp. 152–193. On the prohibition of discrimination in the education system in the context of the ICESCR, see Gebert, 1996, pp. 171–284. Art. 2(2) ICESCR will be discussed in more detail at 9.3. *infra.*

[45] See note 25 *supra.*

[46] Art. 4 ICESCR states, "The States Parties to the present Covenant recognise that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society".

their sole purpose is to promote the general welfare in a democratic society.[47]

The supervision of the ICESCR is entrusted to the Committee on Economic, Social and Cultural Rights, a body composed of independent experts. Article 16(1) instructs states parties to submit reports "on the measures which they have adopted and the progress made in achieving the observance of the rights recognised [in the Covenant]". The reports are examined by the Committee. It evaluates the reports and comments on the degree of realisation of Covenant rights in states parties. The Committee also adopts so-called General Comments. General Comments are intended to define provisions of the ICESCR or related topics more clearly. The Committee further holds general discussions on particular rights in the form of so-called Days of General Discussion.[48]

3.3. *The International Covenant on Civil and Political Rights*

Not only the ICESCR affords protection to the right to education. Also the *International Covenant on Civil and Political Rights* (ICCPR) of 1966 is relevant in this regard.[49] In particular, note should be taken of article 18(4) and article 27. Article 27 concerns the rights of persons belonging to ethnic, religious or linguistic minorities. It has a bearing on the right to education of these persons and will be discussed at a later stage.[50] Article 18 protects the right to freedom of thought, conscience and religion. Article 18(4) states:

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[47] Art. 4 ICESCR will be discussed in more detail at 9.4. *infra.*

[48] On the supervision of the ICESCR, see Coomans, 1992, pp. 192–215, Gebert, 1996, pp. 43–61 and Gomez del Prado, 1998, para. 76 (UN Doc. E/C.12/1998/23). See also Craven, 1995, pp. 30–105 and Arambulo, 1999, pp. 23–49. There are plans to adopt an Optional Protocol to the ICESCR, giving to the Committee the competence to hear individual and group complaints. See Arambulo, 1999. So far, the Committee has adopted two General Comments, particularly devoted to the right to education. These are: General Comment No. 11 (Twentieth Session, 1999) [UN Doc. E/2000/22] Plans of action for primary education (art. 14 ICESCR) [*Compilation*, 2004, pp. 60–63] *and* General Comment No. 13 (Twenty-First Session, 1999) [UN Doc. E/2000/22] The right to education (art. 13 ICESCR) [*Compilation*, 2004, pp. 71–86]. The Committee has further held a Day of General Discussion on the right to education, as laid down in arts. 13 and 14 ICESCR, during its nineteenth session on 30 November 1998. See the Committee's Summary Records of the 49th and 50th Meetings, contained in UN Docs. E/C.12/1998/SR.49 and E/C.12/1998/SR.50, respectively, and its Report on the Eighteenth and Nineteenth Sessions, contained in UN Doc. E/1999/22, paras. 462–514. For a full discussion of the supervision of the ICESCR, see Chapters 8 and 12 *infra.*

[49] International Covenant on Civil and Political Rights (1966) 999 UNTS 171, entered into force on 23 March 1976. On the protection of the right to education by the ICCPR, see Lonbay, 1988, pp. 266–271, Palm-Risse, 1990, pp. 386–392, Coomans, 1992, pp. 124–135, Hodgson, 1992, pp. 270–271 and Gomez del Prado, 1998, paras. 17–18 (UN Doc. E/C.12/1998/23).

[50] See 4.11.1. *infra.*

> The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

This provision corresponds word by word with the latter part of article 13(3) ICESCR. Like that part, article 18(4) addresses the freedom aspect of the right to education. Rather than obligating states parties to take positive steps, it requires them to refrain from acting in a certain manner. The *travaux préparatoires* of the ICCPR show that the underlying purpose of article 18(4) is to provide parents with a means of protecting their children against indoctrination by the state in public schools. When the provision was drafted, many states recalled the abuses of the education system by the national socialist government in Germany in the 1930s and early 1940s.[51] The right of parents to ensure the education of their children in conformity with their own convictions is considered so fundamentally important that article 18(4) may not be derogated from in times of emergency.[52] The right protected by article 18(4) is justiciable. This is confirmed by the fact that article 2(3) ICCPR obligates states parties to ensure to persons, whose rights recognised in the Covenant have been violated, an effective remedy, and to ensure to persons claiming such a remedy that their rights are determined by competent judicial, administrative or legislative authorities.[53]

The supervision of the ICCPR is entrusted to the Human Rights Committee, a body composed of independent experts.[54] Article 40(1) instructs states parties to submit reports. These are considered by the Committee.[55] The Committee is further competent to hear interstate and individual petitions.[56] Both petition procedures are optional. Under article 40(4), the Committee is further empowered to make General Comments. General Comments are intended to summarise the experience of the Committee in examining state reports and to draw the attention of states parties to matters relating to the improvement of the implementation of the Covenant.[57]

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[51] See Hodgson, 1998, pp. 190–191 and the reference there to the *travaux préparatoires* of the ICCPR.

[52] See art. 4(2) ICCPR.

[53] See Gebert, 1996, p. 570.

[54] Art. 28 ICCPR.

[55] Art. 40(4) ICCPR.

[56] Arts. 41 and 42 ICCPR and Optional Protocol to the ICCPR, respectively. Optional Protocol to the International Covenant on Civil and Political Rights (1966) 999 UNTS 302, entered into force on 23 March 1976.

[57] On the supervision of the ICCPR, see Coomans, 1992, pp. 189–191 and Gomez del Prado, 1998, paras. 77–78 (UN Doc. E/C.12/1998/23). Note should be taken of General Comment No. 22 (Forty-Eighth Session, 1993) Article 18 ICCPR [*Compilation*, 2004, pp. 155–158], which contains comments relevant to the right to education at para. 6.

4. *Instruments Providing Protection Against Discrimination*

The UN has adopted a number of instruments which provide protection against discrimination. Many of these instruments also address discrimination in the context of the enjoyment of the right to education. In what follows, instruments providing protection against discrimination on the respective bases of religion, race and gender will be considered.[58]

4.1. *The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*

In an effort to address the problem of discrimination on the basis of religion, the UN General Assembly proclaimed the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* on 25 November 1981.[59] As a resolution of the General Assembly, the Declaration is non-binding. Article 5 of the Declaration concerns the respective rights of parents and their children with regard to moral and religious education.[60] Article 5(3) stipulates that "[t]he child shall be protected from any form of discrimination on the grounds of religion or belief . . .". Children may not, for example, be refused admission to a particular school on the basis that they adhere to a certain faith. Of special importance is article 5(2). It states:

> Every child shall enjoy the right to have access to education in the matter of religion or belief in accordance with the wishes of his parents or, as the case may be, legal guardians, and shall not be compelled to receive teaching on religion or belief against the wishes of his parents or legal guardians, the best interests of the child being the guiding principle.

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[58] For a discussion of the legal and factual aspects of racial discrimination and religious intolerance in education and measures which may be taken to deal with such discrimination and intolerance, see the Study, entitled *Racial Discrimination, Religious Intolerance and Education*, prepared by Abdelfattah Amor, former Special Rapporteur of the Commission on Human Rights on Freedom of Religion or Belief for the Preparatory Committee of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, held at Durban, South Africa from 31 August—8 September 2001, and contained in UN Doc. A/CONF.189/PC.2/22 of 3 May 2001.

[59] UNGA Resolution 36/55 of 25 November 1981.

[60] See Hodgson, 1998, p. 53. Other relevant provisions of the Declaration are arts. 1 and 6. Art. 1 accords to everyone the right to freedom of religion. The right naturally also accrues to children in the context of their attendance at school. Art. 6 specifies particular entitlements which the right to freedom of religion includes, for example, the right to establish and maintain appropriate charitable or humanitarian institutions (art. 6(b)). This would probably include the right to set up and operate private denominational schools or private schools based on a religious ethos.

Article 5(2) confirms the principle that the wishes of parents as regards the education of their children in religious matters are to be respected. The wishes of parents may not conflict, however, with "the best interests of the child".[61]

4.2. *The Declaration, and the International Convention on the Elimination of All Forms of Racial Discrimination*

Discrimination on the basis of race is a problem in many countries. It is encountered in the education systems of many states. Discrimination on the basis of race may take the form of active discrimination by the state. More often, however, such discrimination is static in character, and occurs in the form of discriminatory practices which have manifested themselves in the fabric of a society, the state failing to take steps to eliminate these practices.[62] Racial discrimination may be defined as

> any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.[63]

The UN General Assembly attempted to deal with the problem of racial discrimination by proclaiming the *Declaration on the Elimination of All Forms of Racial Discrimination* on 20 November 1963.[64] The Declaration is non-binding. Article 3(1) thereof enjoins states to make particular efforts to prevent discrimination on the basis of race and to focus their attention in this regard on certain fields. One of the fields mentioned is education.[65]

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[61] For a discussion of the child's right to education versus the right of parents, see 10.5.1.3.6. *infra.*

[62] The terms "active" and "static" discrimination will be defined at 6.2.2.1.2.1. *infra.*

[63] Art. 1(1) of the International Convention on the Elimination of All Forms of Racial Discrimination.

[64] UNGA Resolution 1904 (XVIII) of 20 November 1963.

[65] Art. 3(1) of the Declaration provides, "Particular efforts shall be made to prevent discrimination based on race, colour or ethnic origin, especially in the fields of civil rights, access to citizenship, *education*, religion, employment, occupation and housing" [author's italics]. Note should further be taken of art. 8 of the Declaration. It provides, "All effective steps shall be taken immediately in the fields of teaching, education and information, with a view to eliminating racial discrimination and prejudice and promoting understanding, tolerance and friendship among nations and racial groups, as well as to propagating the purposes and principles of the Charter of the United Nations, of the Universal Declaration of Human Rights, and of the Declaration on the Granting of Independence to Colonial Countries and Peoples".

Subsequently, in 1965, the *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD) was adopted.[66] As an international agreement, its provisions are legally binding on states parties thereto. In terms of article 5 CERD, states parties undertake to prohibit and to eliminate racial discrimination and to guarantee the right of everyone, without distinction as to race, to equality before the law. They undertake to do so, in particular, with regard to the enjoyment of various rights which article 5 enumerates. Article 5(e)(v) mentions the right to education and training.[67]

Article 2 CERD provides an indication of the types of action which are required of states parties. Mere state abstention from acts of racial discrimination, as called for by article 2(1)(a), does not suffice. Positive action on the part of states parties is further necessary. Article 2(1)(c) demands that laws and regulations which have the effect of creating or perpetuating racial discrimination be abolished. This would, for example, cover a law which has the effect of denying access to defined schools to persons belonging to certain racial groups by posing an unreasonable language admission requirement. Article 2(1)(d) envisages that measures which afford protection against racial discrimination by third parties be taken. For example, the law must forbid entrance requirements at private schools which discriminate on the basis of race. By the terms of article 2(2), states parties must take special measures to ensure the adequate development of disadvantaged racial groups for the purpose of guaranteeing them the equal enjoyment of human rights and fundamental freedoms. This provision mandates affirmative action measures in favour of vulnerable racial groups, *i.e.* special measures designed to accelerate equal opportunities and equal treat-

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[66] International Convention on the Elimination of All Forms of Racial Discrimination (1965) 660 UNTS 195, entered into force on 4 January 1969. On the CERD and its relevance to the right to education, see Gomez del Prado, 1998, paras. 19–20 (UN Doc. E/C.12/1998/23) and Hodgson, 1998, pp. 52–53.

[67] Art. 5 CERD provides, "In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: (a) . . .; (b) . . .; (c) . . .; . . . (e) Economic, social and cultural rights, in particular: (i) . . .; (ii) . . .; (iii) . . .; . . . (v) The right to education and training . . .". Another provision of the CERD which addresses racial discrimination and education is art. 7. It provides, "States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups, as well as to propagating the purposes and principles of the Charter of the United Nations, the Universal Declaration of Human Rights, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, and this Convention".

ment for such racial groups, also in the exercise of the right to education.[68] The state may, for example, decide to establish a programme in terms of which additional afternoon classes and assistance in the preparation of school homework are provided to children belonging to vulnerable racial groups where the learning environment at home is not altogether favourable.

The supervision of the CERD is entrusted to the Committee on the Elimination of Racial Discrimination, a body composed of independent experts.[69] Article 9(1) instructs states parties to submit reports "on the legislative, judicial, administrative or other measures which they have adopted and which give effect to the provisions of [the] Convention". The reports are considered by the Committee.[70] The Committee is further competent to hear interstate and individual petitions.[71] Whereas the interstate petition procedure applies automatically to states parties which have ratified the Convention, the individual petition procedure is optional. Under article 9(2), the Committee is further empowered to make General Recommendations. General Recommendations are based primarily on the reports of states parties and draw the attention of states parties to matters relating to the improvement of the implementation of the Convention.[72]

In a recent General Recommendation, the Committee has recommended to states parties that they adopt certain measures for the benefit of members of the Roma communities, discrimination against Roma being a problem in several countries. This includes discrimination in the field of education. General Recommendation XXVII,[73] in Part 3, thus also recommends "Measures in the field of education". Paragraphs 17 to 26 direct states parties:

> 17. To support the inclusion in the school system of all children of Roma origin and to act to reduce drop-out rates, in particular among Roma girls, and, for these purposes, to co-operate actively with Roma parents, associations and local communities.

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[68] In terms of art. 1(4) CERD, states parties may take "[s]pecial measures . . . for the sole purpose of securing adequate advancement of certain racial . . . groups . . . as may be necessary in order to ensure such groups . . . equal enjoyment . . . of human rights and fundamental freedoms . . .". Such measures are not considered to constitute discrimination as defined in the Convention. They must not, however, lead to the maintenance of separate rights for different racial groups and they must further not be continued after the objectives for which they were taken have been achieved.

[69] Art. 8(1) CERD.

[70] Art. 9(1) CERD.

[71] Arts. 11–13 and art. 14 CERD, respectively.

[72] On the supervision of the CERD, see Gomez del Prado, 1998, paras. 79–80 (UN Doc. E/C.12/1998/23). A General Recommendation of the Committee relevant to the right to education is, for example, General Recommendation XX (Forty-Eighth Session, 1996) Article 5 CERD [*Compilation*, 2004, pp. 211–212]. This makes certain comments of a general nature on art. 5 CERD.

[73] General Recommendation XXVII (Fifty-Seventh Session, 2000) Discrimination against Roma [*Compilation*, 2004, pp. 219–224].

18. To prevent and avoid as much as possible the segregation of Roma students, while keeping open the possibility for bilingual or mother tongue tuition; to this end, to endeavour to raise the quality of education in all schools and the level of achievement in schools by the minority community, to recruit school personnel from among members of Roma communities and to promote intercultural education.
19. To consider adopting measures in favour of Roma children, in co-operation with their parents, in the field of education.
20. To act with determination to eliminate any discrimination or racial harassment of Roma students.
21. To take the necessary measures to ensure a process of basic education for Roma children of travelling communities, including by admitting them temporarily to local schools, by temporary classes in their places of encampment, or by using new technologies for distance education.
22. To ensure that their programmes, projects and campaigns in the field of education take into account the disadvantaged situation of Roma girls and women.
23. To take urgent and sustained measures in training teachers, educators and assistants from among Roma students.
24. To act to improve dialogue and communication between the teaching personnel and Roma children, Roma communities and parents, using more often assistants chosen from among the Roma.
25. To ensure adequate forms and schemes of education for members of Roma communities beyond school age, in order to improve adult literacy among them.
26. To include in textbooks, at all appropriate levels, chapters about the history and culture of Roma, and encourage and support the publication and distribution of books and other print materials as well as the broadcasting of television and radio programmes, as appropriate, about their history and culture, including in languages spoken by them.

The above paragraphs envisage that the relevant states parties should adopt an active non-discrimination policy to deal with discrimination against Roma in the field of education. Paragraph 20 states that states parties should "act with determination" to eliminate discrimination. States parties should pursue a policy which is aimed at removing obstacles which deny access to education to Roma. Paragraph 17 speaks of supporting the inclusion in the school system. States parties should also, in terms of paragraph 19, consider adopting affirmative action measures benefiting Roma students. A reading of paragraph 18 reveals that the Committee understands non-discrimination to mean that Roma children should as far as possible be taught in integrated settings. At the same time, however, states parties should undertake measures directed at satisfying the specific educational needs of Roma children. Paragraph 18 refers to the possibility for bilingual or mother tongue tuition. Noteworthy is paragraph 26, which calls upon states parties to undertake measures in the field of education intended to remove negative images of Roma which may provoke discrimination.

In another recent General Recommendation, General Recommendation XXIX,[74] the Committee has recommended to states parties that they adopt certain measures to eliminate descent-based discrimination, "racial discrimination" in terms of article 1(1) CERD also including discrimination based on descent. The General Recommendation's preamble shows that the Committee considers descent-based discrimination to include "discrimination against members of communities based on forms of social stratification such as caste and analogous systems of inherited status which nullify or impair their equal enjoyment of human rights".[75] In paragraph (f), the Committee recommends to states parties that they adopt special measures in favour of descent-based groups to ensure their enjoyment of human rights, also concerning access to education. In paragraph (o), the Committee calls upon states parties to undertake to prevent, prohibit and eliminate practices of segregation directed against members of descent-based groups, including also in education. Part 8, then, particularly addresses the "Right to education". Paragraphs (rr) to (vv) direct states parties to:

> (rr) Ensure that public and private education systems include children of all communities and do not exclude any children on the basis of descent;
> (ss) Reduce school drop-out rates for children of all communities, in particular for children of affected communities, with special attention to the situation of girls;
> (tt) Combat discrimination by public or private bodies and any harassment of students who are members of descent-based communities;
> (uu) Take necessary measures in co-operation with civil society to educate the population as a whole in a spirit of non-discrimination and respect for the communities subject to descent-based discrimination;
> (vv) Review all language in textbooks which conveys stereotyped or demeaning images, references, names or opinions concerning descent-based communities and replace it by images, references, names and opinions which convey the message of the inherent dignity of all human beings and their equality of human rights.

As in the case of discrimination against Roma, states parties should adopt an active non-discrimination policy to deal with descent-based discrimination in the field of education. In other words, they should take active measures to guarantee the inclusion of children of descent-based groups in education, to reduce school drop-out rates for such children, to combat harassment of students of descent-based groups, and to ensure that textbooks convey a positive image of descent-based groups.

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[74] General Recommendation XXIX (Sixty-First Session, 2002) Article 1(1) CERD (descent) [*Compilation*, 2004, pp. 226–232].

[75] Hence, the Committee considers that the term "descent" in art. 1(1) CERD does not only refer to "race", but that it has a meaning which complements the other grounds of discrimination.

4.3. *The Declaration on the Elimination of Discrimination against Women, and the Convention on the Elimination of All Forms of Discrimination against Women*

Of those persons who never go to school or who drop out at an early stage, the majority are female.[76] Discrimination against women in the one form or the other lies at the root of this problem. Discrimination against women may be defined as

> any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.[77]

The UN General Assembly attempted to deal with the problem of discrimination against women by proclaiming the *Declaration on the Elimination of Discrimination against Women* on 7 November 1967.[78] The Declaration is non-binding. Article 9 thereof calls for measures to eliminate discrimination against women in the field of education. It states:

> All appropriate measures shall be taken to ensure to girls and women, married or unmarried, equal rights with men in education at all levels, and in particular:
> (a) Equal conditions of access to, and study in, educational institutions of all types, including universities and vocational, technical and professional schools;
> (b) The same choice of curricula, the same examinations, teaching staff with qualifications of the same standard, and school premises and equipment of the same quality, whether the institutions are co-educational or not;
> (c) Equal opportunities to benefit from scholarships and other study grants;
> (d) Equal opportunities for access to programmes of continuing education, including adult literacy programmes;
> (e) Access to educational information to help in ensuring the health and well-being of families.

Subsequently, in 1979, the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW) was adopted.[79] Like the Declaration, the CEDAW devotes an entire article to the right to education.[80] Article 10 CEDAW states:

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[76] Generally, on the educational rights of women, see Hodgson, 1998, pp. 169–175.

[77] Art. 1 of the Convention on the Elimination of All Forms of Discrimination against Women.

[78] UNGA Resolution 2263 (XXII) of 7 November 1967.

[79] Convention on the Elimination of All Forms of Discrimination against Women (1979) 1249 UNTS 13, entered into force on 3 September 1981. On the CEDAW and its relevance to the right to education, see Coomans, 1992, pp. 136–138, Gomez del Prado, 1998, paras. 21–22 (UN Doc. E/C.12/1998/23) and Hodgson, 1998, pp. 55–56.

[80] There also exist certain other international legal instruments which have a bearing on girls'/women's right to education or which regard education as a means of eliminating dis-

States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women:

(a) The same conditions for career and vocational guidance, for access to studies and for the achievement of diplomas in educational establishments of all categories in rural as well as in urban areas; this equality shall be ensured in pre-school, general, technical, professional and higher technical education, as well as in all types of vocational training;
(b) Access to the same curricula, the same examinations, teaching staff with qualifications of the same standard and school premises and equipment of the same quality;
(c) The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging co-education and other types of education which will help to achieve this aim and, in particular, by the revision of textbooks and school programmes and the adaptation of teaching methods;
(d) The same opportunities to benefit from scholarships and other study grants;
(e) The same opportunities for access to programmes of continuing education, including adult and functional literacy programmes, particularly those aimed at reducing, at the earliest possible time, any gap in education existing between men and women;
(f) The reduction of female student drop-out rates and the organisation of programmes for girls and women who have left school prematurely;
(g) The same opportunities to participate actively in sports and physical education;
(h) Access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning.

Article 10 CEDAW essentially reaffirms article 9 of the Declaration. Article 10(c), (f) and (g) are new, however.[81] Thus, the original programmatic

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crimination against girls/women. Principle 11 of the *Recommendation on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages*, adopted by UNGA Resolution 2018 (XX) of 1 November 1965, for example, states that member states must specify a minimum age for marriage, which may not be less than fifteen years of age. In this way, the girl child's right to compulsory education is reinforced. Article 4(j) of the *Declaration on the Elimination of Violence against Women*, adopted by UNGA Resolution 48/104 of 20 December 1993, stipulates that states should eliminate violence against women by "[adopting] all appropriate measures, especially in the field of education, to modify the social and cultural patterns of conduct of men and women and to eliminate prejudices, customary practices and all other practices based on the idea of the inferiority or superiority of either of the sexes and on stereotyped roles for men and women". Guideline 7(2) and (3) of the *United Nations High Commissioner for Human Rights Principles and Guidelines on Human Rights and Trafficking* (UN Doc. E/2002/68/Add.1) provide that, in order to prevent trafficking, states should consider "[d]eveloping programmes that offer livelihood options, including basic education, skills training and literacy, especially for women and other traditionally disadvantaged groups" and "[i]mproving children's access to educational opportunities and increasing the level of school attendance, in particular by girl children", respectively.

[81] Note should also be taken of art. 14 CEDAW, which addresses the special needs of women living in rural areas. Art. 14(2)(d) provides, "States Parties shall take all appropriate

statement in article 9 of the Declaration has been converted into a binding legal obligation by article 10 of the CEDAW. The purport of article 10 may be described as follows: Women must have the same access to education as men. Quality norms concerning education must be the same for women as for men. This applies especially to curricula, examinations, teaching staff and school premises and equipment. Co-education must be promoted. Education should be directed to changing stereotyped views of the role of men and women in society.[82]

The types of action envisaged to achieve these goals may be gleaned from articles 2 to 4 CEDAW.[83] Article 2(d) expects the state to abstain from acts of discrimination against women. For example, the state may not promulgate legislation which reserves access to education which prepares for technical professions to men. Article 2(f) enjoins the state to abolish laws and regulations which constitute discrimination against women. The state would, for example, have to abolish a legal provision which forbids pregnant girls to attend school classes. Article 2(e) obliges the state to take measures which protect women against discrimination by third parties. For example, it must not be permissible for private schools to use teaching materials which depict women in inferior social roles. Extensive positive action is contemplated by articles 3 and 4(1). Article 3 instructs states parties to take all appropriate measures to ensure the full development of women for the purpose of guaranteeing them the enjoyment of human rights and fundamental freedoms on a basis of equality with men. Article 4(1) stipulates that states parties may adopt ". . . temporary special measures aimed at accelerating *de facto* equality between men and women . . .". Such measures are not considered to constitute discrimination as defined in the Convention. They must not, however, entail as a consequence the maintenance of separate standards and they must further be discontinued when the objectives of equality have been achieved.[84] In the field of education, articles 3 and 4(1) have positive measures in mind, aimed at promoting equal opportunities and equal treatment for women in the exercise

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measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right: (a) . . .; (b) . . .; (c) . . .; (d) To obtain all types of training and education, formal and non-formal, including that relating to functional literacy, as well as, *inter alia*, the benefit of all community and extension services, in order to increase their technical proficiency . . .".

[82] See Coomans, 1992, pp. 137–138.

[83] See *ibidem* at p. 138.

[84] The Committee on the Elimination of Discrimination against Women, supervising the CEDAW, considers the CEDAW to mandate temporary special measures. See General Recommendation No. 25 (Thirtieth Session, 2004) Article 4(1) CEDAW (temporary special measures) [*Compilation*, 2004, pp. 282–290], paras. 18, 24, 29 and 39.

of the right to education. Article 4(1) contemplates affirmative action measures in favour of women.

The supervision of the CEDAW is entrusted to the Committee on the Elimination of Discrimination against Women, a body composed of independent experts.[85] Article 18(1) instructs states parties to submit reports "on the legislative, judicial, administrative or other measures which they have adopted to give effect to the provisions of the . . . Convention and on the progress made in this respect". The reports are considered by the Committee.[86] The Committee is further competent to hear individual and group complaints.[87] The complaints procedure is optional. Under article 21(1), the Committee is further empowered to make General Recommendations, drawing the attention of states parties to matters relating to the improvement of the implementation of the Convention.[88] Thus, the Committee has recommended in General Recommendation No. 5 on temporary special measures that

> states parties make more use of temporary special measures such as positive action, preferential treatment or quota systems to advance women's integration into *education*, the economy, politics and employment.[89]

Similarly, in General Recommendation No. 25, also on temporary special measures, the Committee has recommended that

> [s]tates parties should intensify, within their national contexts, [the application of temporary special measures] especially with regard to *all facets of education at all levels* as well as all facets and levels of training, employment and representation in public and political life.[90]

5. *Instruments on the Rights of Children*

Children are a particularly vulnerable group in society. On account of their tender age, they are generally not in a position to effectively articulate

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[85] Art. 17(1) CEDAW.

[86] Arts. 18(1) and 20(1) CEDAW.

[87] See the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (1999), which entered into force on 22 December 2000.

[88] On the supervision of the CEDAW, see Gomez del Prado, 1998, para. 81 (UN Doc. E/C.12/1998/23).

[89] General Recommendation No. 5 (Seventh Session, 1988) Temporary special measures [*Compilation*, 2004, p. 235]. Author's italics.

[90] General Recommendation No. 25 (Thirtieth Session, 2004) Article 4(1) CEDAW (temporary special measures) [*Compilation*, 2004, pp. 282–290], para. 37. Author's italics. In terms of para. 32, "[T]emporary special measures may include . . . the private education and employment sectors".

the rights which accrue to them and to successfully enforce them. Furthermore, children do not have a lobby which is committed to promoting the rights of children. It is against this background that the UN has made an effort to work out the particularities of the application of human rights to children. It has adopted the Declaration of the Rights of the Child in 1959 and the Convention on the Rights of the Child in 1989. Both Declaration and Convention contain provisions on the right to education.[91]

5.1. *The Declaration of the Rights of the Child*

On 20 November 1959, the UN General Assembly proclaimed the *Declaration of the Rights of the Child*.[92] Principle 7 of the Declaration states:

> The child is entitled to receive education, which shall be free and compulsory, at least in the elementary stages. He shall be given an education which will promote his general culture, and enable him, on a basis of equal opportunity, to develop his abilities, his individual judgement, and his sense of moral and social responsibility, and to become a useful member of society.
>
> The best interest of the child shall be the guiding principle of those responsible for his education and guidance; that responsibility lies in the first place with his parents.
>
> The child shall have full opportunity for play and recreation, which should be directed to the same purposes as education; society and the public authorities shall endeavour to promote the enjoyment of this right.

Like article 26(1) UDHR, Principle 7 confers a general right to education, and also prioritises the realisation of education at the elementary level. Such education must be compulsory and free. In accordance with article 26(3) UDHR, Principle 7 reserves to parents the primary responsibility for the education of their children. The Declaration qualifies the exercise of this responsibility by introducing "the best interest of the child" as "the guiding principle" in this regard.[93] Principle 7 reflects the vision of the time of the child as a passive recipient of education. Rather than regarding the child as the principal subject of the right to education, Principle 7 refers to the entitlement of the child to receive education. This stands in marked contrast to the conception of the child as the bearer of rights in the Convention on the Rights of the Child.[94]

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[91] Generally, on the educational rights of children, see Van Bueren, 1995, pp. 232–261.

[92] UNGA Resolution 1386 (XIV) of 20 November 1959. For more details on the Declaration of the Rights of the Child, see Lonbay, 1988, pp. 286–311 and Hodgson, 1992, pp. 265–269.

[93] See Hodgson, 1992, p. 268.

[94] See Tomaševski, 1999a, para. 75 (UN Doc. E/CN.4/1999/49).

5.2. *The Convention on the Rights of the Child*

The *Convention on the Rights of the Child* (CRC) was adopted in 1989.[95] The Convention was intended to supplement and to expand on the provisions of the Declaration. Whereas the Declaration does not have a legally binding character, the Convention is a legally binding document. The CRC purports to set out the rights of the child in a comprehensive manner. Article 1 CRC defines a child as "every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier".[96] The CRC protects CPR and ESCR. It protects the right to education in two provisions, namely, articles 28 and 29. Before commenting on these provisions, it should be pointed out that the CRC reflects four general principles, which must guide the interpretation of the CRC's rights provisions, also those on the right to education: non-discrimination (article 2), the best interest of the child (article 3), the right to life, survival and development (article 6), and the right to express views and have them taken into account (article 12).[97] In terms of its reporting guidelines regarding periodic reports,[98] the Committee on the Rights of the Child, supervising the CRC, thus requests states parties to "provide information on how the best interests of the child have been given primary consideration in . . . school life . . .",[99] to "provide information on legislative

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[95] Convention on the Rights of the Child (1989) 1577 UNTS 3, entered into force on 2 September 1990. On the protection of the right to education by the CRC, see Lonbay, 1988, pp. 312–347, Coomans, 1992, pp. 152–157, Dorsch, 1992, pp. 179–189, Hodgson, 1992, pp. 276–278, Hodgson, 1996, pp. 243–245, Gomez del Prado, 1998, paras. 23–28 (UN Doc. E/C.12/1998/23) and Hodgson, 1998, pp. 44–47.

[96] The Committee on the Rights of the Child, which supervises the CRC, has emphasised in General Comment No. 4 (Thirty-Third Session, 2003) Adolescent health and development in the context of the Convention on the Rights of the Child [*Compilation*, 2004, pp. 321–332], para. 1, that art. 1 CRC, therefore, covers *adolescents*. Adolescence may be stated to begin at 10 and end at 18. Mindful of the importance of appropriate education for the health and development of adolescents, the Committee, at para. 17, thus urged states parties to "(a) ensure that quality primary education is compulsory and available, accessible and free to all and that secondary and higher education are available and accessible to all adolescents; (b) provide well-functioning school and recreational facilities which do not pose health risks to students, including water and sanitation and safe journeys to school; (c) take the necessary actions to prevent and prohibit all forms of violence and abuse, including sexual abuse, corporal punishment and other inhuman, degrading or humiliating treatment or punishment in school, by school personnel as well as among students; (d) initiate and support measures, attitudes and activities that promote healthy behaviour by including relevant topics in school curricula".

[97] See the Committee on the Rights of the Child's reporting guidelines regarding periodic reports, Part III of which is entitled "General Principles" and contains questions on the four general principles in Divisions A to D.

[98] The reporting guidelines regarding periodic reports are contained in UN Doc. CRC/C/58, entitled "General guidelines regarding the form and content of periodic reports to be submitted by States parties under article 44, para. 1(b), of the Convention".

[99] Question 35 reporting guidelines.

and other measures taken to ensure the right of the child to express views in a manner consistent with his or her evolving capacities, including in . . . school life . . .",[100] and to "provide information on any bodies or instances where the child has a right to participate in decision-making, such as schools . . .".[101]

Article 28 CRC provides as follows:

> 1. States Parties recognise the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:
>   (a) Make primary education compulsory and available free to all;
>   (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
>   (c) Make higher education accessible to all on the basis of capacity by every appropriate means;
>   (d) Make educational and vocational information and guidance available and accessible to all children;
>   (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.
> 2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.
> 3. States Parties shall promote and encourage international co-operation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.

In terms of article 28(1), states parties recognise the right to education. Article 28(1)(a) to (c) address primary, secondary and higher education, respectively, and are comparable to article 13(2)(a) to (c) ICESCR. Primary education must be made compulsory and free to all. Secondary education must be made available and accessible to every child. Accessibility is to be realised by taking appropriate measures, such as the introduction of free education and the offering of financial assistance to those in need thereof. Higher education must be made accessible to all on the basis of capacity. Again, accessibility is to be realised by every appropriate means.

Compared to article 13(2)(a) to (c) ICESCR, however, article 28(1)(a) to (c) have been framed in weaker terms.[102] The use of the word "make" in

[100] Question 43 reporting guidelines.
[101] Question 45 reporting guidelines.
[102] See Hodgson, 1998, p. 46.

article 28(1)(a) introduces the notion of progressiveness to the obligation with regard to primary education in that provision. Article 13(2)(a) ICESCR, which provides that primary education "shall be" compulsory and free to all, read with article 14, which places a time limit on the implementation of compulsory and free primary education, effectively restricts the extent to which the notion of progressiveness applies to the obligation with regard to primary education under the ICESCR. Furthermore, instead of providing that states parties *shall make available* secondary education *in its different forms*—thus the obligation in terms of the ICESCR—the CRC merely provides that states parties must *encourage* the development *of different forms of* secondary education. Moreover, the CRC accords lower priority to the progressive introduction of free secondary and higher education. The ICESCR mandates the progressive introduction of free secondary and higher education. The CRC mentions it as a possible measure as regards secondary education and even deletes it as regards higher education.[103] In certain respects, therefore, the standards postulated by article 28(1)(a) to (c) constitute a step backwards from those of the ICESCR. Generally, the reason for weakening the said provisions of the CRC *vis-à-vis* those of the ICESCR has been the consideration that economically weak states parties should not be overburdened. Even so, considering that the CRC purports to lay down universally valid international norms, the lowering of standards by the CRC is to be regretted.[104]

In addition to the known state obligations concerning primary, secondary and higher education, article 28(1) also introduces two new elements, not yet provided for in the ICESCR. Article 28(1)(d) obliges states parties to make educational and vocational information and guidance available and

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[103] See Coomans, 1992, p. 154.

[104] Dorsch, 1992, p. 183 makes the following general remark in this regard, "Generally, it must be concluded that states readily reached a consensus where the avoidance of financial burdens in the field of education was concerned. In consequence, it is to be feared that the number of illiterate persons will increase even further. It is doubtful whether the weakening *vis-à-vis* art. 13 ICESCR is compensated by the fact that para. 3 makes the elimination of illiteracy and the elimination of ignorance the subject of international co-operation. The mentioned weakening seems understandable from the point of view of developing countries, it is to be criticised, however, under the aspect of the international validity of the CRC". Own translation from original German text, "Insgesamt muß festgestellt werden, daß sich die Staaten schnell einigten, als es um die Vermeidung finanzieller Belastungen im Bildungsbereich ging. Damit ist zu befürchten, daß die Zahl der Analphabeten noch mehr anwachsen wird. Es ist nämlich fraglich ob sich die Abschwächung gegenüber Art. 13 [ICESCR] dadurch kompensieren läßt, daß Abs. 3 die Beseitigung des Analphabetentums und die Beseitigung von Unwissenheit zum Gegenstand internationaler Zusammenarbeit erklärt. Die genannten Abschwächungen erscheinen aus der Sicht der Entwicklungsländer zwar verständlich, sie sind aber unter dem Aspekt der internationalen Geltung der CRC zu kritisieren".

accessible to all children. Article 28(1)(e) requires that states parties take measures to encourage regular attendance at schools and the reduction of drop-out rates.

Article 28(1) must be read together with article 4 CRC. Article 4 obligates states parties to take all appropriate measures to implement the rights protected in the CRC. With regard to economic, social and cultural rights, states parties must do so to the maximum extent of their available resources and, if need be, through international co-operation.[105] Seeing that article 28(1) reflects the right to education as an economic, social and cultural right, *i.e.* the social aspect of the right to education, states parties must by virtue of article 4 take positive steps and devote the maximum amount of resources available towards realising the right to education.[106] It is understood that the implementation of the right to education will have to take place on a progressive basis. This is apparent also from the terms of article 28(1) which impose on states parties obligations ". . . with a view to achieving [the right to education] *progressively* and on the basis of equal opportunity . . .".[107] Article 28(1) entails instructions to the state rather than actionable entitlements of the individual.

Article 28(2) is a novel provision. It directs states parties to "take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the [CRC]". Article 28(2) is intended to protect the child against cruel, inhuman or degrading disciplinary measures in school.[108] It has been criticised that article 28(2) does not effectively protect children against corporal punishment in schools. The argument is that by requiring school discipline to be administered "in conformity with the CRC", article 28(2) wishes to express that disciplinary measures must not conflict with article 37 CRC, which outlaws torture in its different forms. Corporal punishment, however, does not necessarily amount to torture.[109] It should be

[105] Art. 4 CRC states, "States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation".

[106] Art. 4 CRC bears resemblance to art. 22 UDHR and art. 2(1) ICESCR, discussed above.

[107] Author's italics.

[108] See Coomans, 1992, p. 154 and the reference there to the *travaux préparatoires* of the CRC.

[109] See Dorsch, 1992, p. 185. Dorsch considers that the best interests of the child (art. 3(1) CRC) and the child's right to health (art. 24 CRC) only constitute arguments in favour of abolishing corporal punishment in schools.

noted, however, that the Committee on the Rights of the Child, supervising the CRC, has recently remarked as follows:

> Education must also be provided in a way that respects the strict limits on discipline reflected in article 28(2) and promotes non-violence in school. The Committee has repeatedly made clear in its concluding observations that the use of corporal punishment does not respect the inherent dignity of the child nor the strict limits on school discipline.[110]

Also article 28(3) is a novel provision. It has already been referred to above in the context of the discussion of the right to education as a solidarity right.[111] Article 28(3) calls upon states parties to co-operate in matters relating to education. Co-operation is to contribute in particular to "the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods".

Article 29 sets out the aims of education in paragraph (1) and addresses an aspect of the classical freedom of education in paragraph (2), namely, the right to establish private schools. Article 29 provides as follows:

> 1. States Parties agree that the education of the child shall be directed to:
>   (a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;
>   (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
>   (c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilisations different from his or her own;
>   (d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;
>   (e) The development of respect for the natural environment.
> 2. No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

Article 29(1) is based on article 13(1) ICESCR,[112] but introduces two new aims of education. Firstly, article 29(1)(c) refers to *education which develops the*

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[110] ComRC, General Comment No. 1 (Twenty-Sixth Session, 2001) The aims of education (art. 29(1) CRC) [*Compilation*, 2004, pp. 294–301], para. 8.

[111] See 2.8. *supra*.

[112] Like art. 13(1) ICESCR, art. 29(1) CRC mentions the following aims of education:

respect of the child for various persons/states/cultures. Mention is made of respect for, firstly, the child's parents, secondly, his own culture, thirdly, the national values of the country in which he lives, fourthly, the country from which he may originate, and, fifthly, civilisations different from his own. Article 29(1)(c) prohibits degrading references to other states and cultures. At the same time, however, it entails a positive obligation to ensure that children develop respect for such states and cultures. Article 29(1)(c) may be said to convert the general negative prohibition in article 20 ICCPR, which forbids any advocacy of national, racial or religious hatred, into a positive instruction in the context of education. Secondly, article 29(1)(e) refers to *the development of respect for the natural environment*. Degradation of the natural environment is an acute problem of our times. Immediate measures must be taken to prevent further degradation. As a first step, education must inculcate in young persons respect for the natural environment.[113]

Article 29(2) confirms the right laid down in article 13(4) ICESCR, to the effect that individuals and bodies may establish and direct educational institutions. The education provided at such institutions must, however, observe the aims of education enunciated in article 29(1) and it must conform to such minimum standards as may be laid down by the state. Article 29(2) forms part of the freedom aspect of the right to education.

The CRC contains no provision similar to article 13(3) ICESCR on the right of parents to choose for their children private schools and to ensure the religious and moral education of their children in conformity with their own convictions. The question that arises is whether parents as a consequence have no right as regards the education of their children.[114] A combined reading of articles 28(1), 18(1), 3(1), 5, 14(1) and (2), and 12(1) sheds some light on this question. Article 28(1), it has been shown, recognises the child's right to education. Article 18(1) states that "[p]arents, or as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child" and that "[t]he best interests of the

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1. the full development of the human personality (art. 29(1)(a)), 2. the strengthening of respect for human rights and fundamental freedoms (art. 29(1)(b)), 3. the preparation for effective participation in a free society (art. 29(1)(d)), 4. the promotion of understanding, tolerance and friendship among various groups and persons (art. 29(1)(d)) and 5. the development of respect for the principles enshrined in the UN Charter (art. 29(1)(e)). It should be noted that the CRC adds "persons of indigenous origin" to the list of those among whom understanding, tolerance and friendship are to be promoted.

[113] Concerning the aims of education in art. 29(1) CRC, see ComRC, General Comment No. 1 (Twenty-Sixth Session, 2001) The aims of education (art. 29(1) CRC) [*Compilation*, 2004, pp. 294–301]. The provisions of the General Comment will be examined at 10.3. *infra*.

[114] This question is addressed by Coomans, 1992, pp. 155–156 and Van Bueren, 1995, pp. 243–244.

child will be their basic concern".[115] The responsibility of parents also covers their children's education at school. Parents thus do have a right as regards the education of their children. The question, however, is what the nature of their right is. This may be deduced from articles 5, 14(1) and (2), and 12(1). Article 5 obliges states parties to respect the rights and duties of parents "to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognised in the [CRC]". The recognised rights include the right to education in article 28. The principle of article 5 is repeated with regard to the child's right to freedom of religion, protected in article 14(1). Article 14(2) thus obliges states parties to respect the rights and duties of parents "to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child". The right of parents to provide direction is also applicable to the exercise by the child of his right to freedom of religion in the educational context. Article 12(1), finally, provides that states parties "shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child". The conclusion which may be drawn from these provisions is that parents do, in fact, have a right as regards the education of their children, but that this right is not absolute. The right of parents is one of providing guidance and it must be exercised in the best interests of the child. Furthermore, the right to provide guidance becomes "weaker" as the child's capacities evolve.[116]

The CRC contains a few other provisions concerning the right to education. Article 23(3) obligates states parties to ensure that the disabled child has effective access to education and training. Article 23 will be dealt with below when the educational rights of disabled persons are discussed.[117] Another important provision is article 32. Article 32(1) directs states parties to "recognise the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education . . .".[118] Mention should, finally, be made of article 40(4). Article 40(4) provides that education and vocational training

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[115] Note must also be taken of art. 3(1) CRC, which lays down the general principle that "[i]n all actions concerning children . . . the best interests of the child shall be a primary consideration".

[116] For a discussion of the child's right to education versus the right of parents, see 10.5.1.3.6. *infra.*

[117] See 4.8.2. *infra.*

[118] Art. 32 CRC will be referred to at 6.3.2.2. *infra.*

must be available as alternatives to institutional care in the context of juvenile justice.[119]

The provisions of the CRC on the right to education must further be read together with article 2(1). Article 2(1) states, "States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status". What has been stated above in the context of the discussion of the UDHR and the ICESCR may be repeated here. In negative terms, nobody should be denied access to educational institutions in a discriminatory manner. In positive terms, states parties should take positive steps to ensure formal and substantive equality in the enjoyment of the right to education.[120]

A final provision of the CRC, which should be referred to, is article 41. It stipulates that where national or international law is more favourable to the child than provisions of the CRC, such law must prevail.[121] Article 41 may be of importance in as far as the right to education is concerned, because it is also regulated in various other international agreements.[122] It has been seen that the legal obligation of the ICESCR concerning primary education in article 13(2)(a) is stronger than that of the CRC in article 28(1)(a). It has also been seen that the ICESCR obliges states parties to progressively introduce free education at the secondary and higher levels in article 13(2)(b) and (c) but that the obligations of the CRC on the same issue in article 28(1)(b) and (c) are much more lax. One may add that the ICESCR protects the right of parents to choose the school their children should attend in article 13(3), while the CRC is silent in this regard. In all these cases, where a state is party to both the ICESCR and the CRC, the provisions of the ICESCR must prevail. In other respects, the protection provided by the CRC is more extensive than that in terms of the ICESCR. Article 28(2) on school discipline may be mentioned. The present writer submits, however, that even if the CRC did not contain article 41, the stricter provisions of other human rights conventions would

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[119] Of relevance is further art. 30 CRC. It concerns the rights of children belonging to ethnic, religious or linguistic minorities and of children who are indigenous. Art. 30 has a bearing on the right to education of these children and will be referred to at 4.11.1. and 4.12. *infra*.

[120] See notes 25 and 45 *supra*.

[121] Art. 41 CRC states, "Nothing in the present Convention shall affect any provisions which are more conducive to the realisation of the rights of the child and which may be contained in: (a) the law of a State Party; or (b) international law in force for that State".

[122] The matter is discussed by Coomans, 1992, pp. 156–157.

have to be applied. This is demanded by the idea of the effective protection of human rights.[123]

The supervision of the CRC is entrusted to the Committee on the Rights of the Child, a body composed of independent experts.[124] Article 44(1) instructs states parties to submit reports "on the measures they have adopted which give effect to the rights recognised [in the Convention] and on the progress made on the enjoyment of those rights". The reports are examined by the Committee.[125] It evaluates the reports and comments on the degree of realisation of Convention rights in states parties. Under article 45(d), the Committee is further empowered to make General Comments. These define provisions of the CRC or related topics more clearly. The Committee also holds general discussions on particular rights in the form of General Discussion Days.[126]

6. *Instruments Addressing the Rights of Refugee and Stateless Persons, of Internally Displaced Persons, and of Persons Caught Up in Armed Conflict*

6.1. *The Convention Relating to the Status of Refugees, and the Convention Relating to the Status of Stateless Persons*

The right to education is also mentioned in international instruments regulating the treatment of refugee and stateless persons.[127] Article 22 of the *Convention Relating to the Status of Refugees* of 1951[128] and article 22 of the *Convention Relating to the Status of Stateless Persons* of 1954[129] provide in the same words that contracting states must accord to refugee/stateless persons

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[123] The view is also expressed by Coomans, 1992, p. 160.

[124] Art. 43(1) and (2) CRC.

[125] Art. 43(1) CRC.

[126] On the supervision of the CRC, see Gomez del Prado, 1998, para. 82 (UN Doc. E/C.12/1998/23). The Committee has adopted a General Comment devoted to the aims of education in art. 29(1) CRC. See ComRC, General Comment No. 1 (Twenty-Sixth Session, 2001) The aims of education (art. 29(1) CRC) [*Compilation*, 2004, pp. 294–301].

[127] See Hodgson, 1998, pp. 51–52. Specifically, as regards refugee persons, see Gomez del Prado, 1998, para. 29 (UN Doc. E/C.12/1998/23). Generally, on the educational rights of refugee persons, see Hodgson, 1998, pp. 175–176.

[128] Convention Relating to the Status of Refugees (1951) 189 UNTS 150, entered into force on 22 April 1954. In terms of art. 1A.(2) Convention read with art. I(2) Protocol Relating to the Status of Refugees (1967) 606 UNTS 267, entered into force on 4 October 1967, a refugee is a person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country.

[129] Convention Relating to the Status of Stateless Persons (1954) 360 UNTS 117, entered into force on 6 June 1960.

"the same treatment as is accorded to nationals with respect to elementary education".[130] "[W]ith respect to education other than elementary education and, in particular, as regards access to studies, the recognition of foreign school certificates, diplomas and degrees, the remission of fees and charges and the award of scholarships", contracting states are expected to accord to refugee/stateless persons "treatment as favourable as possible, and, in any event, not less favourable than that accorded to aliens generally in the same circumstances".[131]

It is clear from the provisions that states parties may treat refugee/stateless persons less favourably than nationals when it comes to secondary education. Article 22(1) CRC may exceed the protection under the Convention Relating to the Status of Refugees, however, in as far as "education other than elementary education" for refugee children is concerned.[132] Article 22(1) CRC obliges states parties to take appropriate measures to ensure that refugee children can enjoy the rights under the CRC. It has been seen that the CRC protects the right of every child to secondary education.[133]

6.2. *The Guiding Principles on Internal Displacement*

The human rights of internally displaced persons have recently been set out in the *Guiding Principles on Internal Displacement* of 1998.[134] The intro-

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[130] Art. 22(1) Convention Relating to the Status of Refugees/Stateless Persons.
[131] Art. 22(2) Convention Relating to the Status of Refugees/Stateless Persons.
[132] See Hodgson, 1998, p. 175.
[133] The supervision of the Convention Relating to the Status of Refugees is the duty of the Office of the United Nations High Commissioner for Refugees. See art. 35(1) Convention. In terms of art. 35(2) Convention, the contracting states undertake to provide the Office with the information and statistical data requested, concerning the conditions of refugees, the implementation of the Convention, and laws, regulations and decrees which are in force relating to refugees. UNGA Resolution 428 (V) of 14 December 1950 contains provisions regarding measures of protection which the Office of the United Nations High Commissioner for Refugees should provide to refugees. These include, amongst others, promoting through special arrangements with governments the execution of measures calculated to improve the situation of refugees. Naturally, such measures should also address the *educational* needs of refugees. See Gomez del Prado, 1998, para. 83 (UN Doc. E/C.12/1998/23). It should further be noted that the Executive Committee of the Office of the United Nations High Commissioner for Refugees issues Conclusions on International Protection, which, although not formally binding, are relevant to the interpretation of the international protection regime. The Office's *Conclusion on Refugee Children and Adolescents* (No. 84 (XLVIII)—1997) thus calls upon states to respect the right of children and adolescents to education, and urges states to protect child and adolescent refugees by ensuring their access to education. Its *Conclusion on Reception of Asylum-Seekers in the context of Individual Asylum Systems* (No. 93 (LIII)—2002) recommends to states that their reception arrangements should address the educational needs of children, especially unaccompanied and separated children.
[134] Guiding Principles on Internal Displacement, Addendum to the Report of the Representative of the Secretary-General, Mr. Francis Deng, submitted pursuant to

ductory note to the Guiding Principles states that the purpose of the Guiding Principles is to address the specific needs of internally displaced persons by identifying rights relevant to their protection. The Guiding Principles are said to restate, clarify and address the gaps of existing international human rights law and international humanitarian law applicable to internally displaced persons.[135] In themselves, they are not legally binding, however. Principle 23 of the Guiding Principles concerns the right to education. It states:

1. Every human being has the right to education.
2. To give effect to this right for internally displaced persons, the authorities concerned shall ensure that such persons, in particular displaced children, receive education which shall be free and compulsory at the primary level. Education should respect their cultural identity, language and religion.
3. Special efforts should be made to ensure the full and equal participation of women and girls in educational programmes.
4. Education and training facilities shall be made available to internally displaced persons, in particular adolescents and women, whether or not living in camps, as soon as conditions permit.

The stipulation in Principle 23(2) to the effect that education should respect the culture, language and religion of internally displaced persons is of considerable significance. The provision provides protection against attempts of forcing on such persons the foreign culture, language or religion of the place where they happen to find themselves. It is ultimately aimed at facilitating the reintegration of internally displaced persons into the community which they left. The "as soon as conditions permit" qualification in Principle 23(4) to the direction to states to make education available to internally displaced persons is rather problematic. It reaffirms the practice of suspending education in humanitarian programmes, whether designed for the benefit of refugees or internally displaced persons. Humanitarian programmes regularly encompass water, food, clothing, shelter, sanitation and basic medical services. The absence of education from the mentioned survival packages reflects the view that education is not indispensable for survival or subsistence. This opinion is unfortunate. The absence of education dooms the victims of armed conflicts and disasters to remain the recipients

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Resolution 1997/39 of 11 April 1997 of the Commission on Human Rights, UN Doc. E/CN.4/1998/ 53/Add.2 of 11 February 1998. In terms of para. 2 "Introduction: Scope and Purpose" of the Guiding Principles, internally displaced persons are "persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalised violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognised State border".

[135] Introductory note to the Guiding Principles, para. 9.

of assistance and prevents them from becoming self-sustaining.[136] Education has only been included in various humanitarian programmes in the 1990s.[137] This development has, however, not yet become institutionalised.[138]

6.3. *The Geneva Conventions on International Humanitarian Law*

The human rights of persons caught up in armed conflict are protected by international humanitarian law. Some of its normative provisions refer to education.[139]

The Geneva "Red Cross" conventions of 1949 dealing with the treatment of prisoners of war and the protection of civilian persons in time of war should be cited in this regard. Article 38(1) of the *Geneva Convention Relative to the Treatment of Prisoners of War* of 1949[140] states that "[w]hile respecting the individual preferences of every [interned] prisoner, the Detaining Power shall encourage the practice of intellectual, educational and recreational pursuits . . . amongst prisoners, and shall take the measures necessary to ensure the exercise thereof by providing them with adequate premises and necessary equipment". Article 94(1) of the *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* of 1949[141] states in similar terms that "[t]he Detaining Power shall encourage intellectual, educational and recreational pursuits . . . amongst internees . . . It shall take all practical measures to ensure the exercise thereof, in particular by providing suitable premises". Article 94(2) goes on to state that "[a]ll possible facilities shall be granted to internees to continue their studies or to take up new subjects". The latter provision further states that "[t]he education of children and young people shall be ensured; they shall be allowed to attend schools either within the place of internment or outside". Generally dealing with the protection of populations, article 24(1) stipulates that "[t]he Parties to the conflict shall take the necessary measures to ensure that chil-

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[136] With regard to this view, see Tomaševski, 2001a, para. 49 (UN Doc. E/CN.4/2001/52) and Tomaševski, 2001c, p. 31.

[137] UNICEF claims that "children have a fundamental right to receive educational services during emergencies". See UNICEF, *Education in Emergencies: A Basic Right . . . A Development Necessity*, New York: UNICEF, undated, p. 3.

[138] See Tomaševski, 2001a, para. 49 (UN Doc. E/CN.4/2001/52). The Office of the United Nations High Commissioner for Refugees helps approximately 6,5 million of the world's internally displaced persons, although it has no formal mandate to work with this group of persons.

[139] See Gomez del Prado, 1998, paras. 50–52 (UN Doc. E/C.12/1998/23) and Hodgson, 1998, p. 52.

[140] Geneva Convention Relative to the Treatment of Prisoners of War (1949) 75 UNTS 135, entered into force on 21 October 1950.

[141] Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949) 75 UNTS 287, entered into force on 21 October 1950.

dren under fifteen, who are orphaned or are separated from their families as a result of the war, are not left to their own resources, and that . . . their education [is] facilitated in all circumstances" and that "[t]heir education shall, as far as possible, be entrusted to persons of a similar cultural tradition". Dealing with the subject of occupied territories, article 50(1) provides that "[t]he Occupying Power shall, with the co-operation of the national and local authorities, facilitate the proper working of all institutions devoted to the care and education of children". This provision relates in particular to pre-school, primary and secondary educational institutions.[142]

Also the two additional protocols to the Geneva conventions of 1977 address issues of education. Article 78(2) of the *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)* of 1977,[143] applicable to situations of international armed conflict, provides that, in cases in which children have been evacuated to a foreign country, "each child's education, including his religious and moral education as his parents desire, shall be provided while he is away with the greatest possible continuity". Article 4(3)(a) of the *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)* of 1977,[144] applicable to situations of internal armed conflict, generally provides that children "shall receive an education, including religious and moral education, in keeping with the wishes of their parents, or in the absence of parents, of those responsible for their care".

All in all, the provisions cited envisage that, in situations of armed conflict, interned prisoners of war and civilian internees have opportunities to pursue educational activities and that they are encouraged to make use of these. Civilian internees must be assisted where they wish to continue or take up studies. Children must, at all times, continue to receive education. The right of parents to ensure their children's religious and moral education in accordance with their own convictions must be respected.[145]

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[142] Note should, however, be taken of art. 64(2) Convention, which states that the occupying power may subject the population of the occupied territory to provisions which are essential to maintain the orderly government of the territory and to ensure the security of the occupying power. The occupying power may thus exercise a certain measure of supervision with regard to education in as far as questions directly relating to the military occupation or hostilities are concerned.

[143] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (1977) 1125 UNTS 3, entered into force on 7 December 1978.

[144] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (1977) 1125 UNTS 609, entered into force on 7 December 1978.

[145] The Geneva conventions and the protocols thereto are monitored by the International

7. *Instruments on the Rights of Migrant Workers*

The right to education is further dealt with in international instruments which address the situation of migrant workers and members of their families.[146]

7.1. *The Declaration on the Human Rights of Individuals Who are not Nationals of the Country in Which They Live*

Article 8 of the *Declaration on the Human Rights of Individuals Who are not Nationals of the Country in Which They Live* of 1985[147] stipulates that all aliens lawfully residing in the territory of a state are to enjoy, in accordance with national laws, various rights. Paragraph (c) mentions, amongst others, the right to education. It provides, however, that aliens must "fulfil the requirements under the relevant regulations for participation" and that "undue strain [must not be] placed on the resources of the State". It appears that undocumented aliens fall beyond the scope of protection.[148] However, note may be taken of the decision of the United States Supreme Court in the case of *Plyler v. Doe*.[149] The court there emphasised the importance of education for a person to be successful in life, and held that, in the light of the equal protection clause of the US Constitution, undocumented children had the same right to attend free public education through grade 12 as lawful residents and citizens.

7.2. *The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*

Detailed provisions on the right to education as it accrues to migrant workers[150] and members of their families[151] are laid down in the *International*

Committee of the Red Cross and a specially constituted International Fact-Finding Commission. See Gomez del Prado, 1998, paras. 92–93 (UN Doc. E/C.12/1998/23).

[146] Generally, on the educational rights of migrant workers and members of their families, see Hodgson, 1998, pp. 176–177.

[147] UNGA Resolution 40/144 of 13 December 1985. As a resolution of the General Assembly, the Declaration is of a non-binding nature.

[148] See Hodgson, 1998, p. 177.

[149] 457 U.S. 202 (1982). For a discussion of the case, see Christopher, 1984, pp. 513–536. The case will be discussed at 9.3.3.1. *infra*.

[150] In terms of art. 2(1) Convention, a "migrant worker" is a person engaged in a remunerated activity in a state of which he is not a national.

[151] In terms of art. 4 Convention, "members of the family of a migrant worker" include the person married to the migrant worker, dependent children and certain other dependent persons.

Convention on the Protection of the Rights of All Migrant Workers and Members of their Families of 1990.[152] The Convention, which entered into force recently, creates legally binding obligations for states parties.

Part III of the Convention protects the human rights of all migrant workers and members of their families, *i.e.* irrespective of whether their situation is regular or not. Note should be taken of articles 12(4) and 30 in this part of the Convention. Article 12 guarantees to migrant workers and members of their families the right to freedom of thought, conscience and religion. Article 12(4) guarantees the liberty of *parents, at least one of whom is a migrant worker,* to ensure the religious and moral education of their children in conformity with their own convictions. The provision accords to such parents the right generally provided for in article 13(3) ICESCR. Article 30 states as follows:

> Each child of a migrant worker shall have the basic right of access to education on the basis of equality of treatment with nationals of the State concerned. Access to public pre-school educational institutions or schools shall not be refused or limited by reason of the irregular situation with respect to stay or employment of either parent or by reason of the irregularity of the child's stay in the State of employment.

Article 30 grants to *the children of migrant workers* the right of access to education on an equal basis with nationals. Unlike the Conventions Relating to the Status of Refugees/Stateless Persons, the Convention under discussion does not apply a differential standard in relation to elementary education and "education other than elementary education".[153] Because article 30 has been placed in Part III of the Convention, the irregular situation of neither parent nor child may affect the enjoyment of the right of access to education by the child. This is, in fact, specifically emphasised by article 30.

Part IV of the Convention protects various other rights of those migrant workers and members of their families who are in a regular situation. In

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[152] The text of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, which entered into force on 1 July 2003, is available on the website of the Office of the UNHCHR (www.ohchr.org). On the protection of the right to education by the Convention, see Gomez del Prado, 1998, paras. 30–33 (UN Doc. E/C.12/1998/23). Take note further of the educational provisions of the European Convention on the Legal Status of Migrant Workers, discussed at 5.2.1.3. *infra.* Migrant worker communities will often also enjoy protection as minorities. The Human Rights Committee has commented that the rights under art. 27 ICCPR apply to all members of minorities within a state party's territory and not just nationals. See its comments on Norway's third periodic report, A/49/40 at p. 23, and Japan's third periodic report, A/49/40 at p. 25.

[153] See Hodgson, 1998, p. 177.

this part of the Convention, articles 43[154] and 45[155] are relevant to the right to education. Article 43(1) provides that *migrant workers* must be treated equally with nationals as regards access to educational institutions and services, vocational guidance and placement services, and vocational training and retraining facilities and institutions. Article 43(2) then proceeds to obligate states parties to promote conditions to ensure effective equality of treatment to enable migrant workers to enjoy these rights. Article 45(1) provides that *members of the families of migrant workers* must be treated equally with nationals as regards access to educational institutions and services, and vocational guidance and training institutions and services. Paragraphs (2) to (4) of article 45 address the educational situation of *the children of migrant workers*. States parties are required to pursue a policy aimed at facilitating the integration of the children of migrant workers in the local school system. In particular, such children should be taught the local language. States parties must further facilitate for the children of migrant workers the teaching *of* their mother tongue and culture. It is also stated that states parties may provide special schemes of education *in* the mother tongue of the children of migrant workers. In the fulfilment of their obligations, states parties should, where appropriate, co-operate with the states of origin. It should be pointed out that paragraphs (2) to (4) postulate two competing goals. On the one hand, the children of migrant workers should be inte-

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[154] Art. 43 of the Convention states, "1. Migrant workers shall enjoy equality of treatment with nationals of the State of employment in relation to: (a) Access to educational institutions and services subject to the admission requirements and other regulations of the institutions and services concerned; (b) Access to vocational guidance and placement services; (c) Access to vocational training and retraining facilities and institutions; . . . 2. States Parties shall promote conditions to ensure effective equality of treatment to enable migrant workers to enjoy the rights mentioned in paragraph 1 of the present article whenever the terms of their stay, as authorised by the State of employment, meet the appropriate requirements. 3. States of employment shall not prevent an employer of migrant workers from establishing housing or social or cultural facilities for them. Subject to article 70 of the present Convention, a State of employment may make the establishment of such facilities subject to the requirements generally applied in that State concerning their installation".

[155] Art. 45 of the Convention states, "1. Members of the families of migrant workers shall, in the State of employment, enjoy equality of treatment with nationals of that State in relation to: (a) Access to educational institutions and services, subject to the admission requirements and other regulations of the institutions and services concerned; (b) Access to vocational guidance and training institutions and services, provided that requirements for participation are met; . . . 2. States of employment shall pursue a policy, where appropriate in collaboration with the States of origin, aimed at facilitating the integration of children of migrant workers in the local school system, particularly in respect of teaching them the local language. 3. States of employment shall endeavour to facilitate for the children of migrant workers the teaching of their mother tongue and culture and, in this regard, States of origin shall collaborate whenever appropriate. 4. States of employment may provide special schemes of education in the mother tongue of children of migrant workers, if necessary in collaboration with the States of origin".

grated in the school system of the receiving state and be taught the native language, on the other, they should be taught their own culture and language. A fine balance needs to be achieved between these two goals. Neither may a state pursue assimilationist policies nor should it allow parallel societies to exist, which are often the cause of social unrest. What is called for is a *via media*. It is noted with disappointment that article 45(4) makes the offering of teaching *in* the mother tongue merely optional.[156]

The Convention provides overdue protection of the rights of migrant workers and members of their families, including the right to education. It is to be feared though, that the full implementation of the rights of the Convention will take a long time, as many states are not even in a position to guarantee the rights concerned to their own nationals.

The supervision of the Convention is entrusted to the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, a body composed of independent experts.[157] The Committee is competent to examine the reports of states parties,[158] which these must submit on the measures taken to give effect to the provisions of the Convention.[159] The Committee is also competent to hear interstate petitions[160] and individual petitions.[161] Both petition procedures are optional.[162]

8. *Instruments on the Rights of Disabled Persons*

Another vulnerable group in society are disabled persons. A few instruments of international law address the right to education as it accrues to disabled persons.[163]

8.1. *The Declaration on the Rights of Disabled Persons*

On 9 December 1975, the UN General Assembly proclaimed the *Declaration on the Rights of Disabled Persons*.[164] Principle 6 of the Declaration states that

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[156] For the reasons stated in note 152 *supra*, useful reference, in construing the language rights in education of the children of migrant workers, may be made to the various parts of this book, which address such rights of persons belonging to minorities.

[157] Art. 72 Convention. The Committee met for the first time in March 2004.

[158] Art. 74 Convention.

[159] Art. 73 Convention.

[160] Art. 76 Convention.

[161] Art. 77 Convention.

[162] On the supervision of the Convention, see Gomez del Prado, 1998, para. 84 (UN Doc. E/C.12/1998/23).

[163] Generally, on the educational rights of disabled persons, see Hodgson, 1998, pp. 155–168.

[164] UNGA Resolution 3447 (XXX) of 9 December 1975. See Hodgson, 1998, p. 54 and p. 156.

"[d]isabled persons have the right to medical, psychological and functional treatment, including prosthetic and orthetic appliances, to medical and social rehabilitation, *education*, *vocational training and rehabilitation*,[165] aid, counselling, placement services and other services which will enable them to develop their capabilities and skills to the maximum and will hasten the processes of their social integration or reintegration".[166] The Declaration does not bind member states of the UN. A binding provision concerning the educational rights of disabled persons has, however, been included in the CRC.

8.2. *Article 23 of the Convention on the Rights of the Child*

The first three paragraphs of article 23 CRC provide as follows:

1. States Parties recognise that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.
2. States Parties recognise the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child.
3. Recognising the special needs of a disabled child, assistance extended in accordance with paragraph 2 of the present article shall be provided free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child, and shall be designed to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development.

Article 23 is significant in that it is the first binding legal provision which directly addresses the educational rights of disabled persons, if only those of disabled children.[167] The provision emphasises the social integration and the individual development of disabled persons.[168] Paragraph (1) recognises

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[165] Author's italics.

[166] See also the General Assembly's *Declaration on the Rights of Mentally Retarded Persons*, adopted by UNGA Resolution 2856 (XXVI) of 20 December 1971. Principle 2 of the Declaration states, "The mentally retarded person has a right to proper medical care and physical therapy and to such *education*, *training*, rehabilitation and guidance as will enable him to develop his ability and maximum potential" [author's italics]. See Hodgson, 1998, p. 54 and p. 156.

[167] The ICESCR does not directly address the rights of disabled persons.

[168] For a short discussion of art. 23 CRC, see Hodgson, 1998, pp. 157–158.

the disabled child's right to a full and decent life. On that basis, paragraph (2) accords him a right to special care and further an entitlement to assistance. The latter is contingent, however, on the availability of state resources. Paragraph (3) requires the assistance to be provided "free of charge, whenever possible". The assistance granted must be designed to ensure that the disabled child has effective access to education.[169]

Nevertheless, article 23 is deficient in at least two respects. Firstly, the effect of paragraphs (2) and (3) is such that the disabled child's right to education is rendered dependent on state resources being available, and that it is permissible for the state, where it considers this necessary, to charge school or related fees.[170] This effect is regrettable, particularly, in as far as primary education is concerned. Primary education should be available free of charge to every child. Disability may not constitute a ground for charging fees, even if the state makes available special facilities and services which are for the benefit of disabled children only. This is demanded by a reading of article 28(1)(a), which obligates states parties to make primary education available free to all, with article 2(1), which requires states parties to guarantee the rights set forth in the CRC without discrimination, amongst others, on the basis of disability. Secondly, it is unfortunate that the CRC does not impose a legal obligation on the state to promote or to deliver pre-school educational services for disabled children.[171] Pre-school education is important for disabled children. It can be used to identify impairment at an early stage and on that basis to give the necessary attention to the disabled child.

8.3. *The Standard Rules on the Equalisation of Opportunities for Persons with Disabilities*

Detailed norms on the rights of disabled persons are contained in the *Standard Rules on the Equalisation of Opportunities for Persons with Disabilities* of 1993.[172] The Rules were adopted by the UN General Assembly and are non-binding. Nonetheless, they are founded on a strong political commitment among

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[169] The ComRC has stressed in General Comment No. 4 (Thirty-Third Session, 2003) Adolescent health and development in the context of the Convention on the Rights of the Child [*Compilation*, 2004, pp. 321–332], para. 19, that, in accordance with art. 23(3) CRC, assistance should be provided "to ensure that the disabled child/adolescent has effective access to and receives good quality education" and that "[s]tates should recognise the principle of equal primary, secondary and tertiary educational opportunities for disabled children/adolescents, where possible in regular schools".

[170] See Hodgson, 1998, p. 158.

[171] See *idem*.

[172] UNGA Resolution 48/96 of 20 December 1993.

member states of the UN to ensure that disabled persons may enjoy the same rights as other persons.

Rule 6 addresses education as a target area for the equal participation of disabled persons.[173] The introduction to Rule 6 calls upon states to "recognise the principle of equal primary, secondary and tertiary educational opportunities for children, youth and adults with disabilities, in integrated settings". States are urged to "ensure that the education of persons with disabilities is an integral part of the educational system". Rule 6 thus emphasises equality of educational opportunity for disabled persons and the delivery of education within an integrated mainstream setting.

Rule 6(1) to (7) stipulate as follows:

1. General educational authorities are responsible for the education of persons with disabilities in integrated settings. Education for persons with disabilities should form an integral part of national educational planning, curriculum development and school organisation.
2. Education in mainstream schools presupposes the provision of interpreter and other appropriate support services. Adequate accessibility and support services, designed to meet the needs of persons with different disabilities, should be provided.
3. Parent groups and organisations of persons with disabilities should be involved in the education process at all levels.
4. In States where education is compulsory it should be provided to girls and boys with all kinds and all levels of disabilities, including the most severe.
5. Special attention should be given in the following areas:
   (a) Very young children with disabilities;
   (b) Pre-school children with disabilities;
   (c) Adults with disabilities, particularly women.
6. To accommodate educational provisions for persons with disabilities in the mainstream, States should:
   (a) Have a clearly stated policy, understood and accepted at the school level and by the wider community;
   (b) Allow for curriculum flexibility, addition and adaptation;
   (c) Provide for quality materials, ongoing teacher training and support teachers.
7. Integrated education and community-based programmes should be seen as complementary approaches in providing cost-effective education and training for persons with disabilities. National community-based programmes should encourage communities to use and develop their resources to provide local education to persons with disabilities.

Compared to article 23 CRC, a number of new elements are noteworthy.[174] First of all, Rule 6 applies not only to disabled children but to all disabled persons. Rule 6(3), furthermore, recognises the involvement of par-

[173] For a short discussion of Rule 6, see Hodgson, 1998, pp. 159–161 and p. 164.
[174] These features are pointed out by Hodgson, 1998, pp. 160–161.

ent groups and organisations of persons with disabilities in the education process. Moreover, Rule 6(5) compels states to give special attention to very young and pre-school children with disabilities. New is also the notion that education for disabled persons should be cost-effective.

Rule 6(8) and (9) address the issue of special education. Special education is education for persons suffering from physical or mental disabilities outside the mainstream and may take place in special units for disabled persons within mainstream schools or in special schools for disabled persons.[175] Rule 6(8) and (9) state:

> 8. In situations where the general school system does not yet adequately meet the needs of all persons with disabilities, special education may be considered. It should be aimed at preparing students for education in the general school system. The quality of such education should reflect the same standards and ambitions as general education and should be closely linked to it. At a minimum, students with disabilities should be afforded the same portion of educational resources as students without disabilities. States should aim for the gradual integration of special education services into mainstream education. It is acknowledged that in some circumstances special education may currently be considered to be the most appropriate form of education for some students with disabilities.
> 9. Owing to the particular communication needs of deaf and deaf/blind persons, their education may be more suitably provided in schools for such persons or special classes and units in mainstream schools. At the initial stage, in particular, special attention needs to be focused on culturally sensitive instruction that will result in effective communication skills and maximum independence for people who are deaf or deaf/blind.

Rule 6 supports the view that disabled persons should, if possible, be educated in integrated settings in mainstream educational institutions.[176] Arguments in support of integration and mainstreaming include "egalitarianism and economic arguments concerning the untapped productive potential of disabled persons and the financial and opportunity costs of maintaining in specialised institutions those who could be self-sufficient and productive".[177] Rule 6 considers that special education should be seen as the

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[175] See the discussion of special education in Hodgson, 1998, pp. 163–166.

[176] This view is also supported by UNESCO. See UNESCO, *Review of the Present Situation of Special Education*, 1988. It is further supported by the CESCR. Its General Comment No. 5 (Eleventh Session, 1994) [UN Doc. E/1995/22] Persons with disabilities [*Compilation*, 2004, pp. 25–35], para. 35 points out that "[s]chool programmes in many countries today recognise that persons with disabilities can best be educated within the general education system" and considers that "[i]n order to implement such an approach, States should ensure that teachers are trained to educate children with disabilities within regular schools and that the necessary equipment and support are available to bring persons with disabilities up to the same level of education as their non-disabled peers".

[177] Hodgson, 1998, p. 163. An argument in support of special education is that it is,

exception rather than the rule. It should be seen as a temporary expedient, pending restructuring of the general school system, so as to adequately meet the needs of disabled persons. Rule 6(9) states, however, that, at present, special education may be the only viable option for deaf or blind persons.[178]

8.4. *Draft Articles for a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities*

It should further be pointed out that there are plans for an international convention on the protection of the rights of disabled persons. In 2001, the UN General Assembly established an Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities to consider proposals for such a convention.[179] At its second session in June 2003, the Ad Hoc Committee decided to establish a Working Group with the aim of preparing and presenting a draft text of a convention, which would be the basis for negotiation by member states. The Working Group prepared the draft text as requested and presented it to the Ad Hoc Committee, at its third session in May/June 2004.[180] Once in force, the convention will create a legally binding framework for protecting and promoting the rights of disabled persons. Draft article 17 addresses the right to education of disabled persons. It states:

1. States Parties recognise the right of all persons with disabilities to education. With a view to achieving this right progressively and on the basis of equal opportunity, the education of children with disabilities shall be directed to:
   (a) the full development of the human potential and sense of dignity and self-worth, and the strengthening of respect for human rights, fundamental freedoms and human diversity;
   (b) enabling all persons with disabilities to participate effectively in a free society;
   (c) the development of the child's personality, talents and mental and physical abilities to their fullest potential;
   (d) take into account the best interests of the child, in particular by individualising education plans.
2. In realising this right, States Parties shall ensure:

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perhaps, better tailored to meet the special educational needs of disabled persons. See Hodgson, 1998, p. 163.

[178] See Hodgson, 1998, p. 164.

[179] UNGA Resolution 56/168 of 19 December 2001.

[180] See the Report of the Working Group to the Ad Hoc Committee, contained in UN Doc. A/AC.265/2004/WG/1, Annex I.

(a) that all persons with disabilities can choose inclusive and accessible education in their own community (including access to early childhood and pre-school education);
(b) the provision of required support, including the specialised training of teachers, school counsellors and psychologists, an accessible curriculum, an accessible teaching medium and technologies, alternative and augmentative communication modes, alternative learning strategies, accessible physical environment, or other reasonable accommodations to ensure the full participation of students with disabilities;
(c) that no child with disabilities is excluded from free and compulsory primary education on account of [its] disability.

3. States Parties shall ensure that where the general education system does not adequately meet the needs of persons with disabilities special and alternative forms of learning [are] made available. Any such special and alternative forms of learning should:
   (a) reflect the same standards and objectives provided in the general education system;
   (b) be provided in such a manner to allow children with disabilities to participate in the general education system to the maximum extent possible;
   (c) allow a free and informed choice between general and special systems;
   (d) in no way limit the duty of States Parties to continue to strive to meet the needs of students with disabilities in the general education system.
4. States Parties shall ensure that children with sensory disabilities may choose to be taught sign language or Braille, as appropriate, and to receive the curriculum in sign language or Braille. States Parties shall take appropriate measures to ensure quality education to students with sensory disabilities by ensuring the employment of teachers who are fluent in sign language or Braille.
5. States Parties shall ensure that persons with disabilities may access general tertiary education, vocational training, adult education and lifelong learning on an equal basis with others. To that end, States Parties shall render appropriate assistance to persons with disabilities.

As, at the time of writing this, the draft articles for the convention have just become available, it should suffice to make a few comments on whether draft article 17 introduces any modifications to the objective of inclusiveness, as contained in Rule 6 Standard Rules on the Equalisation of Opportunities for Persons with Disabilities. It has been stated that Rule 6 considers education in integrated settings in mainstream educational institutions as the rule and special education as the exception to that rule. Draft article 17 places the emphasis on the right to freely choose between inclusive and special education.[181] The Working Group itself stresses that "[t]here is no intention to create an obligation on students with disabilities to attend general schools where their needs may not be adequately

[181] See, in particular, draft art. 17(2)(a) and (3)(c).

met".[182] Yet, draft article 17 specifically highlights the importance of the availability of possibilities of inclusive education, by referring to the duty of states parties at all times "to continue to strive to meet the needs of students with disabilities in the general education system".[183] In view of the introduction of the element of a choice between inclusive and special education in draft article 17, and bearing in mind that the consequences of whatever form of education is eventually chosen on a disabled person's later life may be far-reaching, the final version of article 17 should place greater emphasis on the best interests of the child in this choice. It may also be noted that the relationship between inclusive and special education in draft article 17 appears to be of a more sophisticated nature than that in Rule 6. Draft article 17(3)(b) states that special education should "be provided in such a manner to allow children with disabilities to participate in the general education system to the maximum extent possible", thereby making it clear that "the general education system and specialist education services are not mutually exclusive options, and that there is a range of options in between[184] that are available".[185]

9. *The Rights of Older Persons: The United Nations Principles for Older Persons*

Another disadvantaged group in society are older persons. The right to education as it pertains to older persons is addressed in the *United Nations Principles for Older Persons* of 1991.[186] The Principles were adopted by the UN General Assembly and are non-binding.

The CESCR, supervising the ICESCR, has adopted a General Comment on the ESCR of older persons, commenting also on the right to education of older persons.[187] Paragraph 36 of the General Comment emphasises that the right to education under article 13(1) ICESCR must, in the case of older persons, "be approached from two different and complementary points of view", namely, "(a) the right of elderly persons to benefit from educational programmes; and (b) making the know-how and experi-

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[182] UN Doc. A/AC.265/2004/WG/1, Annex I, draft art. 17, note 58.
[183] See draft art. 17(3)(d).
[184] UN Doc. A/AC.265/2004/WG/1, Annex I, draft art. 17, note 62.
[185] Concerning the supervision of the proposed convention, the Working Group notes that it did not have time to consider this issue. See UN Doc. A/AC.265/2004/WG/1, Annex I, draft art. 25, note 112.
[186] UNGA Resolution 46/91 of 16 December 1991.
[187] CESCR, General Comment No. 6 (Thirteenth Session, 1995) [UN Doc. E/1996/22] The economic, social and cultural rights of older persons [*Compilation*, 2004, pp. 35–45].

ence of elderly persons available to younger generations". This approach is supported by the United Nations Principles for Older Persons.

Principle 4 states:

> Older persons should have access to appropriate educational and training programmes,

and Principle 16 states:

> Older persons should have access to the educational, cultural, spiritual and recreational resources of society.

These two Principles recognise the right of older persons to benefit from education. Older persons must, therefore, "on the basis of their preparation, abilities and motivation, be given access to the various levels of education through the adoption of appropriate measures regarding literacy training, life-long education, access to university, *etc.*".[188]

Principle 7 states:

> Older persons should remain integrated in society, participate actively in the formulation and implementation of policies that directly affect their well-being and share their knowledge and skills with younger generations.

This Principle recognises "the important role that elderly and old persons still play in most societies as the transmitters of information, knowledge, traditions and spiritual values and . . . the fact that this important tradition should not be lost".[189]

The educational needs of older persons have also been stressed at the Second World Assembly on Ageing, held at Madrid, Spain from 8 to 12 April 2002. The Assembly adopted a *Political Declaration* and an *International Plan of Action on Ageing*.[190] Article 11 of the Declaration provides *inter alia* that older persons should continue to have access to education and training programmes. The Plan of Action reveals the two principles that older persons should be able to benefit from education and that they should share their knowledge and skills with younger generations. Paragraph 41 generally concerns the first principle and paragraph 42 the second principle. Paragraph 41 contemplates action aimed at achieving equitable access to basic and continuing education for all adults, promoting literacy, numeracy and technological skills training for older persons and the ageing workforce, and implementing policies that promote access to training and

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[188] *Ibidem* at para. 37.

[189] *Ibidem* at para. 38.

[190] The International Plan of Action on Ageing (2002) replaces the International Plan of Action on Ageing (1982), adopted at the World Assembly on Ageing, held at Vienna, Austria in 1982.

retraining for older workers. Paragraph 42 envisages action directed at fully utilising the potential of older persons in education, providing opportunities within educational programmes for the exchange of experience between generations, and encouraging the utilisation of the social, cultural and educational knowledge of older persons.

10. *The Rights of Detained Persons: Including the Standard Minimum Rules for the Treatment of Prisoners*

A number of international instruments address the right to education in as far as it accrues to detained persons.

Probably the best known of the instruments is the *Standard Minimum Rules for the Treatment of Prisoners* of 1955. The Rules were adopted by the First Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva, Switzerland in 1955. They were subsequently approved by resolutions of the UN Economic and Social Council (ECOSOC).[191] Rule 77 states:

> 1. Provision shall be made for the further education of all prisoners capable of profiting thereby, including religious instruction in the countries where this is possible. The education of illiterates and young prisoners shall be compulsory and special attention shall be paid to it by the administration.
> 2. So far as practicable, the education of prisoners shall be integrated with the educational system of the country so that after their release they may continue their education without difficulty.

Note should also be taken of Rule 40, which provides that all prisons must have a library for the use of prisoners. The library must be adequately stocked with both recreational and instructional books. Prisoners must be encouraged to make full use of the library.[192]

An instrument which deals with the right to education of juveniles in detention is the *Rules for the Protection of Juveniles deprived of their Liberty*, adopted

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[191] See ECOSOC Resolutions 663C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

[192] On the educational rights of detained persons, see also Principle 28 of the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, adopted by UNGA Resolution 43/173 of 9 December 1988 and Principle 6 of the *Basic Principles on the Treatment of Prisoners*, adopted by UNGA Resolution 45/111 of 14 December 1990. Principle 28 states, "A detained or imprisoned person shall have the right to obtain within the limits of available resources, if from public sources, reasonable quantities of educational, cultural and informational material, subject to reasonable conditions to ensure security and good order in the place of detention or imprisonment". Principle 6 states, "All prisoners shall have the right to take part in cultural activities and education aimed at the full development of the human personality".

by the UN General Assembly on 14 December 1990.[193] Section IV.E. of the Rules is entitled "Education, vocational training and work" and comprises Rules 38 to 46.[194] Rule 38 provides for the education of juveniles of compulsory school age, Rule 39 for that of juveniles above that age. Rule 38 stipulates as follows:

> Every juvenile of compulsory school age has the right to education suited to his or her needs and abilities and designed to prepare him or her for return to society. Such education should be provided outside the detention facility in community schools wherever possible and, in any case, by qualified teachers through programmes integrated with the education system of the country so that, after release, juveniles may continue their education without difficulty. Special attention should be given by the administration of the detention facilities to the education of juveniles of foreign origin or with particular cultural or ethnic needs. Juveniles who are illiterate or have cognitive or learning difficulties should have the right to special education.

Rule 39 stipulates as follows:

> Juveniles above compulsory school age who wish to continue their education should be permitted and encouraged to do so, and every effort should be made to provide them with access to appropriate educational programmes.[195]

A study of the educational provisions of the above instruments reveals that certain distinct entitlements accrue to detained persons. Firstly, illiterate

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[193] UNGA Resolution 45/113 of 14 December 1990.

[194] Note should also be taken of the *Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules")*, adopted by UNGA Resolution 40/33 of 29 November 1985. Para. 26 on the objectives of institutional treatment, in Part Five on "Institutional Treatment", states in subpara. (1), "The objective of training and treatment of juveniles placed in institutions is to provide care, protection, education and vocational skills, with a view to assisting them to assume socially constructive and productive roles in society". Note should further be taken of the *Guidelines for the Prevention of Juvenile Delinquency ("The Riyadh Guidelines")*, adopted by UNGA Resolution 45/112 of 14 December 1990. Part IV on "Socialisation Processes" states that emphasis should be placed on preventive policies facilitating the successful socialisation and integration of all children and young persons through, *inter alia*, education. Section B (Guidelines 20 to 31) is then also entitled "Education". It is often juveniles at social risk who commit delinquent acts. Para. 24 thus states, "Educational systems should extend particular care and attention to young persons who are at social risk. Specialised prevention programmes and educational materials, curricula, approaches and tools should be developed and fully utilised".

[195] Rules 40 and 41 are also devoted to education. Rule 40 states, "Diplomas or educational certificates awarded to juveniles while in detention should not indicate in any way that the juvenile has been institutionalised". Rule 41 states, "Every detention facility should provide access to a library that is adequately stocked with both instructional and recreational books and periodicals suitable for the juveniles, who should be encouraged and enabled to make full use of it". Rules 42 and 43 are devoted to vocational training. Rule 42 states, "Every juvenile should have the right to receive vocational training in occupations likely to prepare him or her for future employment". Rule 43 states, "With due regard to proper vocational selection and to the requirements of institutional administration, juveniles should be able to choose the type of work they wish to perform".

adults and juveniles of compulsory school age have a right to compulsory education. Secondly, literate adults and juveniles above the compulsory school age have a right to further education. The stated provisions also make it very clear that the education of detained persons must be integrated with the educational system of the country so that after their release they may continue their education without difficulty.

11. *Instruments on the Rights of Minorities*

Minorities normally strive to preserve their identity. Ethnic minorities usually wish to continue enjoying their own culture, linguistic minorities using their own language, and religious minorities professing and practising their own religion. With regard to all these aspects of identity, education plays an important role. Education constitutes one of the essential means for preserving minority identity. It is of importance, therefore, that members of minorities be granted a right to education which provides for their educational needs. Article 27 ICCPR and article 30 CRC and aspects of articles 2 and 4 of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities are relevant in this regard.[196]

11.1. *Article 27 of the International Covenant on Civil and Political Rights, and Article 30 of the Convention on the Rights of the Child*

Article 27 ICCPR states:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

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[196] Generally, on the educational rights of minorities, see Cullen, 1993, pp. 143–177, Minority Rights Group, 1994, Thornberry and Gibbons, 1996–1997, pp. 115–152 and Hodgson, 1998, pp. 85–119. The educational rights of minorities are also dealt with elsewhere in this book. See the discussion of art. 5(1)(c) of the Convention against Discrimination in Education at 6.2.2.1.2.6. *infra*, the Framework Convention for the Protection of National Minorities at 5.2.1.4. *infra*, the European Charter for Regional or Minority Languages at 5.2.1.5. *infra* and Part IV of the Concluding Document of the Copenhagen Conference on the Human Dimension of the Conference on Security and Co-operation in Europe at 5.2.3. *infra*. See also the discussion of the educational rights of minorities at 9.3.3.3. *infra*.

Article 27[197] does not expressly accord a right to education to persons belonging to minorities.[198] Such a right may, nevertheless, be considered to be implied in article 27. Francesco Capotorti, a former Special Rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, has recognised in his report, entitled *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities* of 1979, that article 27 includes a right to respect for minority culture within the education system.[199] The objective of article 27 is that minority culture should survive and flourish. The vitality of minority culture depends significantly on the effectiveness of its transmission from one generation to the next through the medium of education.[200]

Article 27 has been interpreted by the Human Rights Committee in General Comment No. 23.[201] The General Comment sheds some light on the content of article 27. Its provisions will be referred to in the discussion below. Article 30 CRC essentially repeats article 27. Additionally, however, it provides protection to indigenous peoples. Article 30 is further specifically directed to children.[202] What is said with regard to article 27 below also applies to article 30.

Many states are reluctant to recognise the rights of minorities. States often fear that the exercise of such rights may lead to growing self-confidence on the part of minorities, resulting eventually in exaggerated claims for

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[197] On art. 27 ICCPR and its relevance to the right to education, see Coomans, 1992, pp. 126–131, Thornberry, 1994, p. 11, Thornberry and Gibbons, 1996–1997, pp. 129–130 and Hodgson, 1998, p. 89 and p. 105.

[198] International law attempts to define minorities by focusing on the numerically inferior numbers of minorities, their non-dominant position, the existence of certain objective criteria differentiating them form the majority population (*e.g.* cultural, linguistic or religious) and the subjective wish of minorities to preserve their identity. See, for example, Capotorti, 1979, p. 96.

[199] See Capotorti, F., *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities* (UN Doc. E/CN.4/Sub.2/384/Rev.1), New York: UN, 1979 (UN Sales No. E.78.XIV.1).

[200] The link between cultural survival and development, and education is recognised by Coomans, 1992, pp. 126–127 and Hodgson, 1998, p. 86. The relevance of art. 27 ICCPR to minority education appears also to be recognised by the Human Rights Committee which has directed questions on minority education to reporting states when considering state compliance with art. 27. See Thornberry, 1994, p. 11.

[201] HRC, General Comment No. 23 (Fiftieth Session, 1994) Article 27 ICCPR [*Compilation*, 2004, pp. 158–161].

[202] Art. 30 CRC states, "In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language". On art. 30 CRC and its relevance to the right to education, see Thornberry and Gibbons, 1996–1997, p. 131.

autonomy or even in threats of secession. In the opinion of many states, minority rights threaten national unity and territorial integrity. It needs to be pointed out, however, that article 27 grants a right which is clearly different from the right to self-determination under article 1 ICCPR.[203] The right to self-determination belongs to peoples. Article 27, however, relates to rights conferred on individuals. The enjoyment of the rights in article 27, therefore, "does not prejudice the sovereignty and territorial integrity of a State party".[204] Consequently, educational rights under article 27 accrue to the individual members of minorities and not to minorities as such.

The persons designed to be protected by article 27 are those who belong to a group and who share in common a culture, a language and/or a religion.[205] The individuals designed to be protected need not be nationals of the state party.[206] Article 27 grants rights to persons belonging to minorities which "exist" in a state party. It appears from the *travaux préparatoires* that this wording was chosen so as to deny the claims of immigrants and so as to limit the right to those minorities which have traditionally lived in a state party.[207] It has now, however, been held by the Human Rights Committee in General Comment No. 23 that it is not relevant to determine the degree of permanence that the term "exist" connotes. The General Comment states:

> . . . Those rights simply are that individuals belonging to those minorities should not be denied the right, in community with members of their group, to enjoy their own culture, to practise their religion and speak their language. Just as they need not be nationals or citizens, they need not be permanent residents. Thus, migrant workers or even visitors in a State party constituting such minorities are entitled not to be denied the exercise of those rights. . . . The existence of an ethnic, religious or linguistic minority in a given State party does not depend upon a decision by that State party but requires to be established by objective criteria.[208]

A study of the *travaux préparatoires* of the ICCPR reveals that at the time of its drafting, most states, particularly Western and Latin American states, had in mind that minorities should be assimilated. They rejected special rights for minorities. They only wished a guarantee of non-discrimination,

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[203] General Comment No. 23, see note 201, para. 3.1.
[204] *Ibidem* at para. 3.2.
[205] *Ibidem* at para. 5.1.
[206] *Idem.*
[207] See Coomans, 1992, pp. 130–131 and the references there to the *travaux préparatoires* of the ICCPR.
[208] General Comment No. 23, see note 201, para. 5.2.

of negative equality, for minorities.[209] Accordingly, states were against an active role of the state in the provision of education for minorities. Minorities were considered to have a right to establish their own schools, but they had to do so with their own capital and without the financial involvement of the state. Special rights aimed at ensuring positive equality for minorities were not supported.[210] This attitude of states is reflected in the wording of article 27 that persons belonging to minorities "shall not be denied the right" to enjoy their culture, language and religion.

It is noted with approval, however, that article 27 is increasingly interpreted in a positive manner.[211] The mere negative protection of minority rights is outdated. It does not reflect the enlightened modern approach in terms of which the development of cultural, linguistic and religious identity is considered to enrich the fabric of society as a whole.[212] General Comment No. 23 perceives the state to have a positive obligation to protect the rights of members of minorities against violation. Positive measures of protection are held to be required not only against acts of the state party itself, but also against acts of other persons within the state party.[213] Principally, the Committee has in mind here the enactment of protective legislation. General Comment No. 23 further appreciates that "positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practise their religion, in community with the other members of the group".[214] The Committee envisages that states parties should take active measures and that they should devote financial and other resources towards the aim of ensuring that members of minorities can enjoy their culture, language and religion in the same way that the rest of the population can enjoy its culture, language and religion.

All this having been said, it is clear that members of minorities have a right to education which enables the minority group to preserve its identity. The state must not merely refrain from interfering where minorities

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[209] See Coomans, 1992, p. 129 and the references there to the *travaux préparatoires* of the ICCPR.

[210] See *ibidem* at pp. 129–130 and the references there to the *travaux préparatoires* of the ICCPR.

[211] Capotorti, 1979 has held that, despite the negative wording of art. 27 ICCPR, mere negative abstention on the part of the state is not an adequate rendering of that right so that positive measures, including special minority education measures, may be required.

[212] General Comment No. 23, see note 201, states at para. 9, amongst others, "The Committee concludes that article 27 relates to rights whose protection imposes specific obligations on States parties. The protection of these rights is directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole".

[213] General Comment No. 23, see note 201, para. 6.1.

[214] *Ibidem* at para. 6.2.

set up and run their own schools. The state must also be seen as the bearer of positive obligations in respect of minority education. Article 27 does not answer the question, however, how far exactly the obligations of the state extend in this regard.

11.2. *The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities*

On 18 December 1992, the UN General Assembly proclaimed the *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities*.[215]

Article 2(1) of the Declaration bears resemblance to article 27 ICCPR. Like that article, it refers to the right of persons belonging to minorities as regards their own culture, language and religion. Unlike that article, however, it defines the right in positive terms.[216] Article 2(1) states:

> Persons belonging to national or ethnic, religious and linguistic minorities . . . have the right to enjoy their own culture, to profess and practise their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination.

Article 2(4) goes on to state:

> Persons belonging to minorities have the right to establish and maintain their own associations.

This provision covers the right of persons belonging to minorities to found and operate private educational institutions based on a particular culture, religion and/or language. It is unfortunate, though, that the provision does not impose an obligation on states to assist minorities, financially or otherwise, to set up and operate such institutions. Quite often minorities lack the necessary means to do so all on their own. State support is then essential if the right accorded in article 2(4) is not to remain an empty shell.[217]

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[215] UNGA Resolution 47/135 of 18 December 1992. On the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities and its protection of educational rights, see Thornberry, 1994, pp. 11–12 and Hodgson, 1998, pp. 94–95 and pp. 105–106. See further Eide, A. (as Chairperson of the Working Group on Minorities), *Commentary to the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, UN Doc. E/CN.4/Sub.2/AC.5/2001/2.

[216] Concerning the title and the scope of the Declaration, see Eide, 2001, paras. 6–20 (UN Doc. E/CN.4/Sub.2/AC.5/2001/2). The Commentary states that the individuals designed to be protected under the Declaration need not be nationals of the state.

[217] See, however, Eide, 2001, para. 63 (UN Doc. E/CN.4/Sub.2/AC.5/2001/2), who states that, if the state for justifiable reasons does not ensure the opportunity to learn a certain minority language in public schools, "[i]t would be a requirement that the State does ensure the existence of and fund some [private] institutions which can ensure the

Article 4(3) formulates an obligation for states to ensure that persons belonging to minorities can enjoy certain language rights in education. It provides:

> States should take appropriate measures so that, wherever possible, persons belonging to minorities may have adequate opportunities to learn their mother tongue or to have instruction in their mother tongue.

The options of the state are, to ensure the exercise of these rights in state schools, or to ensure their exercise in subsidised private schools. It is lamentable that the state's obligation has been phrased in a restricted manner. It is stated that the state "should", rather than that it "shall", take measures. Article 4(3) is also deficient in as far as it refers to the study *of* and instruction *in* the mother tongue as alternatives. The study *of and* instruction *in* the mother tongue—both, at least, up to the secondary school level—are essential, if children belonging to minorities are to acquire fluency in their mother tongue and if minority culture is to be effectively protected. It is, furthermore, unclear what constitutes "appropriate measures". Moreover, article 4(3) is also weakened by the insertion of the rather open-ended phrase "wherever possible".[218]

Also relevant to the right to education is article 4(4). It stipulates:

> States should, where appropriate, take measures in the field of education, in order to encourage knowledge of the history, traditions, language and culture of the minorities existing within their territory. Persons belonging to minorities should have adequate opportunities to gain knowledge of the society as a whole.

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teaching of that minority language. . . . It would . . . depend on the resources of the State how far the obligation to fund teaching of [the minority language] . . . goes".

[218] See also Thornberry, 1994, p. 12 and Hodgson, 1998, p. 94 and pp. 105–106. Generally on art. 4(3) Declaration, see Eide, 2001, paras. 59–64 (UN Doc. E/CN.4/Sub.2/AC.5/2001/2). In the light of the restrictive formulation of art. 4(3) Declaration, it is to be welcomed that the Commentary to the UN Declaration interprets art. 4(3) more widely. It holds that with regard to a minority language which is a territorial language traditionally spoken by many in a region of the country, pre-school and primary school education should be in the child's own language. The official language should gradually be introduced at later stages. See para. 61. With regard to a minority language which is a non-territorial language spoken traditionally by a minority within a country, but which is not associated with a particular region of that country, the Commentary holds that the same principles should apply, unless the persons belonging to the minority live dispersed. In this case, persons belonging to the minority would have to establish private schools, where the minority language is the main language of instruction. The children would further have to learn the official language more fully at an earlier stage. See para. 63. Finally, with regard to the languages used by persons belonging to new minorities (immigrants), the Commentary holds that solutions will be more difficult to find, but that, where new minorities settle compactly together in a region of the country and in large number, there is no reason to treat them differently from old minorities. See para. 64.

Article 4(4) directs states to promote knowledge among society at large of the minorities living in its midst. Conversely, states must acquaint minorities with the larger society to prevent them from lapsing into ethnic fundamentalism.[219] The provision represents a call upon states to revise the curricula at educational institutions so as to enhance intercultural understanding.[220]

In 1995, the Working Group on Minorities was created as a subsidiary body of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities.[221] The Working Group has been entrusted with the task of promoting the rights set out in the Declaration. In particular, the Working Group has been mandated to review the realisation of the rights of the Declaration, to examine possible solutions to problems involving minorities and to recommend further measures for the promotion of the rights of persons belonging to minorities.[222] The Working Group also deals with issues of minority education.[223]

The Declaration does not create legal obligations for member states of the UN. Nevertheless, its positively phrased provisions must be seen to constitute progression when compared with the negative terms of article 27 ICCPR.[224] It has been stated that

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[219] See Thornberry, 1994, p. 12.

[220] See Hodgson, 1998, p. 94. Generally on art. 4(4) Declaration, see Eide, 2001, paras. 65–70 (UN Doc. E/CN.4/Sub.2/AC.5/2001/2). For a general discussion of human rights education and minority rights, see Alfredsson, 2001, pp. 125–137.

[221] The Working Group has been created pursuant to ECOSOC Resolution 1995/31 of 25 July 1995.

[222] See Commission on Human Rights Resolution 1995/24 of 3 March 1995.

[223] Take note, for example, of the following two working papers prepared for the Working Group: Siemienski, G., *Education Rights of Minorities: The Hague Recommendations*, UN Doc. E/CN.4/Sub.2/AC.5/1997/WP.3 (on the Hague Recommendations, see 9.3.3.3.3.2. *infra*) and Mehedi, M., *Multicultural and Intercultural Education and Protection of Minorities*, UN Doc. E/CN.4/Sub.2/AC.5/1999/WP.5. For comments on the progress in the interpretation and implementation of the Declaration, the strengths and weaknesses in the work of the Working Group and a programme of action for the coming years, see Hadden, 2004 (UN Doc. E/CN.4/Sub.2/AC.5/2004/WP.3). At para. 36, Hadden points out that the Declaration, like other international and regional instruments, does not provide clear guidance on whether the promotion of minority culture should be achieved in separate or common schools. He suggests, "In cases where a linguistic or religious minority is concentrated in a particular region the claim for separate schools is probably strongest. In cases where one or more ethnic or immigrant minorities have become established in major cities or in places where there is a long history of communal antagonism the arguments for integrated or common schooling with a multicultural, and if necessary multilingual, curriculum may be more compelling".

[224] See also arts. 1 and 4(2) of the Declaration, which lay down positive obligations for states. Art. 1 states, "1. States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity. 2. States shall adopt appropriate legislative and other measures to achieve those ends". Art. 4(2) states, "States shall take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and

> [t]he importance of the UN Declaration should not be underestimated. Although it is not a treaty, the Declaration expresses global minimum standards for the protection and promotion of minority rights and will affect the content and design of UN programmes on minorities for the foreseeable future.[225]

12. *The Rights of Indigenous Peoples: The Draft Declaration on the Rights of Indigenous Peoples*

It has been observed that indigenous peoples constitute the poorest of the minorities in the countries in which they live.[226] Indigenous peoples may be described as minorities with a particular relationship to their traditional territory.[227]

The Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries of 1957, an international agreement adopted by the ILO,[228] sought to protect the rights of indigenous peoples, including their educational rights. It was subsequently realised, however, that the Convention was unsatisfactory in various ways.[229] In response, the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities appointed a Special Rapporteur, José R. Martínez Cobo, in 1971, and instructed him to study the situation of indigenous peoples. In 1986, his report, entitled *Study of the Problem of Discrimination Against Indigenous Populations*, was released.[230] The study highlighted, *inter alia*, that the right to education of indigenous populations was not being properly protected. States often did not recognise traditional indigenous education and frequently aimed at replacing it with

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customs, except where specific practices are in violation of national law and contrary to international standards".

[225] Thornberry, 1994, p. 12.

[226] See Capotorti, 1979, p. 88, para. 516.

[227] There is a growing tendency, however, to deal with indigenous peoples as a separate topic. Whereas the definition of minorities applies objective and subjective criteria (see note 198 *supra*), the definition of indigenous peoples appears to emphasise subjective criteria. Art. 1(2) of the Convention concerning Indigenous and Tribal Peoples in Independent Countries (1989) states that "[s]elf-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of [the] Convention apply". Generally, on the educational rights of indigenous peoples, see Hodgson, 1998, pp. 121–132.

[228] Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (1957) (ILO Convention No. 107).

[229] In this respect, see the discussion of the Convention concerning Indigenous and Tribal Peoples in Independent Countries at 6.3.2.3. *infra*.

[230] See Martínez Cobo, J., *Study of the Problem of Discrimination Against Indigenous Populations* (UN Doc. E/CN.4/Sub.2/1986/7 and Adds.1–4, Vol. V), New York: UN, 1987 (UN Sales No. E.86.XIV.3).

formal educational processes. There was a tendency to cut off indigenous pupils from their indigenous culture.[231]

The findings of the Special Rapporteur prompted two important developments, firstly, the adoption by the ILO in 1989 of the Convention concerning Indigenous and Tribal Peoples in Independent Countries[232] and, secondly, the creation in 1982 of a Working Group on Indigenous Populations as a subsidiary body of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities.[233] Part VI of the ILO Convention is devoted to the educational rights of indigenous peoples. As an instrument of the ILO, the Convention will be discussed in Chapter 6.[234] The Working Group has been mandated, amongst others, to develop international standards for the protection of indigenous rights. It set out doing so in 1982, when it commenced its work on a *Draft Declaration on the Rights of Indigenous Peoples*. The Working Group approved its Draft Declaration at its 1994 session.[235] Once the Draft Declaration has been adopted by the UN General Assembly, it will establish non-binding international standards regarding the rights of indigenous peoples.[236]

Articles 15, 16 and 31 of the Draft Declaration concern the right to education of indigenous peoples. Article 31 lays down the principle that indigenous peoples have the right to self-government in matters relating to their internal and local affairs. Education is mentioned as one of these affairs.

Article 15 states as follows:

> Indigenous children have the right to all levels and forms of education of the State. All indigenous peoples also have this right and the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.

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[231] See Martínez Cobo, 1987, p. 9, paras. 89–91.

[232] Convention concerning Indigenous and Tribal Peoples in Independent Countries (1989) (ILO Convention No. 169).

[233] The Working Group has been created pursuant to ECOSOC Resolution 1982/34 of 7 May 1982.

[234] See 6.3.2.3. *infra*.

[235] The Draft Declaration was adopted by Sub-Commission Resolution 1994/45 of 26 August 1994 and is contained in the Annex thereto. Presently, the open-ended intersessional Working Group on the Draft Declaration on the Rights of Indigenous Peoples, a subsidiary body of the UN Commission on Human Rights created by Commission Resolution 1995/32 of 3 March 1995, considers the Draft Declaration. It is required to elaborate a Draft Declaration on the Rights of Indigenous Peoples.

[236] It may further be noted that Resolution 2001/57 of 24 April 2001 of the Commission on Human Rights appointed a Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People for a period of three years. In 2004, the Commission decided to extend the mandate for a further period of three years.

> Indigenous children living outside their communities have the right to be provided access to education in their own culture and language.
>
> States shall take effective measures to provide appropriate resources for these purposes.

Article 15 formulates a number of important principles:[237]

- Indigenous children are recognised to have a right to education.
- Indigenous peoples are also recognised to have this right. By virtue of their right to education, and their right to self-government in educational affairs, indigenous peoples are entitled, *within their particular communities*, to establish and control their own educational systems and institutions. These may provide education in the indigenous language concerned.[238] Unlike article 13(4) ICESCR or article 29(2) CRC, article 15 does not require that the education given in indigenous educational institutions conform to minimum standards laid down or approved by the state. In effect, therefore, the Draft Declaration lays the basis for the existence of parallel education systems, *i.e.* a national education system, on the one hand, and indigenous education systems, on the other. The various education systems rank equally. The national system is not superior to the indigenous systems.[239]
- With regard to indigenous children living *outside their communities*, the state must ensure access to education in the indigenous culture and language. It may provide such education in state schools. Alternatively, it may subsidise private schools offering education of the nature described.[240]

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[237] See also Hodgson, 1998, pp. 127–128.

[238] Stavenhagen, R., *Indigenous Issues: Human Rights and Indigenous Issues*, UN Doc. E/CN.4/2002/97 (Report submitted by the Special Rapporteur of the Commission on Human Rights on the Situation of Human Rights and Fundamental Freedoms of Indigenous People) mentions, at para. 64, that "[s]pecialists in education agree that early schooling in both the native mother tongue and the official language of the state is of great benefit to indigenous children, who may become proficient in the vehicular (*i.e.* official) language of the wider society without losing their vernacular idiom". At para. 65, he points out, however, that "the indigenous right to education in [the] own languages is not being adequately implemented and requires serious attention in the future".

[239] The latest discussions within the framework of the open-ended inter-sessional Working Group on the Draft Declaration on the Rights of Indigenous Peoples (Commission on Human Rights) reveal, however, that governments want art. 15 Draft Declaration to be amended in such a way that indigenous educational systems and institutions would have to meet minimum educational standards set by the state. See the Report of the Working Group on the Ninth Session, contained in UN Doc. E/CN.4/2004/81, para. 36.

[240] The latest discussions within the framework of the open-ended inter-sessional Working Group on the Draft Declaration on the Rights of Indigenous Peoples (Commission on Human Rights) reveal, however, that governments are concerned about the cost implications for states of this obligation and, therefore, want it to be made contingent on the financial resources at their disposal. See the Report of the Working Group on the Ninth Session, contained in UN Doc. E/CN.4/2004/81, para. 37.

- The state is expected to provide resources to secure the exercise of the rights in article 15. This is a novel aspect not encountered in earlier international instruments.

Article 16 states as follows:

> Indigenous peoples have the right to have the dignity and diversity of their cultures, traditions, histories and aspirations appropriately reflected in all forms of education and public information.
>
> States shall take effective measures, in consultation with the indigenous peoples concerned, to eliminate prejudice and discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all segments of society.

Article 16 prescribes standards in respect of the content of education.[241] School curricula must be revised so as to show respect for the culture and values of indigenous peoples. Education must be directed at promoting understanding, tolerance and friendship among indigenous peoples and the rest of society.

Reference must further be made to article 30 CRC, already referred to above in the context of the discussion of the educational rights of persons belonging to minorities.[242] Article 30 provides in part that, "[i]n those States in which . . . persons of indigenous origin exist, a child . . . who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language". What has been stated above, applies *mutatis mutandis* also here. It is deplorable that the CRC does not recognise in positive terms the right of indigenous peoples to education, their right to found and operate their own educational institutions and their right to use their own languages in education.[243]

Finally, attention should be drawn to the recent developments related to the creation of a forum at the international level focusing on indigenous issues. The proposal to create such a forum was officially introduced at the Vienna World Conference on Human Rights in 1993. On 28 July 2000 then, ECOSOC adopted Resolution 2000/22 establishing the Permanent Forum on Indigenous Issues. The Forum is composed of sixteen independent experts. It is to serve as an advisory body to ECOSOC, with a mandate to discuss indigenous issues relating to economic and social development,

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[241] See Hodgson, 1998, p. 128.

[242] See 4.11.1. *supra.*

[243] When the CRC was drafted, the inclusion of language rights for indigenous peoples in the sphere of education in art. 30 CRC was unsuccessfully sought from non-governmental side. See Hodgson, 1998, p. 129 and the reference there to the *travaux préparatoires* of the CRC.

culture, the environment, education, health and human rights. The Forum has held its third session from 10 to 21 May 2004. On that occasion, the Forum recognised certain principles and made various recommendations in the field of indigenous education to UN member states, the UN system and indigenous peoples organisations.[244] The Forum considers that "[e]ducation can be an effective means to protect the cultural traditions of indigenous peoples" and that "[e]ducation, when it is culturally appropriate, promotes mother tongue learning and includes indigenous knowledge in the curriculum, can help defend against the negative impacts of cultural globalisation".[245]

13. *Other Declarations of the United Nations General Assembly*

The discussion of legal instruments adopted at the international level concludes with a reference to three further declarations adopted by the UN General Assembly which comment on matters of educational concern and which are difficult to classify under any of the above headings.

On the topic of the aims of education, mention must be made of the *Declaration on the Promotion among Youth of the Ideals of Peace, Mutual Respect and Understanding between Peoples*, adopted by the UN General Assembly on 7 December 1965.[246] Principle II of the Declaration states:

> All means of education, including as of major importance the guidance given by parents or family, instruction and information intended for the young should foster among them the ideals of peace, humanity, liberty and international solidarity and all other ideals which help to bring peoples closer together, and acquaint them with the role entrusted to the United Nations as a means of preserving and maintaining peace and promoting international understanding and co-operation.

Principle VI of the Declaration states:

> A major aim in educating the young shall be to develop all their faculties and to train them to acquire higher moral qualities, to be deeply attached to the noble ideals of peace, liberty, the dignity and equality of all men, and imbued with respect and love for humanity and its creative achievements. To this end the family has an important role to play.
>
> Young people must become conscious of their responsibilities in the world they will be called upon to manage and should be inspired with confidence in a future of happiness for mankind.

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[244] See the Permanent Forum's Report on the Third Session, contained in UN Doc. E/2004/43, paras. 16–23.

[245] *Ibidem* at para. 17(a) and (e), respectively.

[246] UNGA Resolution 2037 (XX) of 7 December 1965. See Hodgson, 1998, p. 55.

These provisions set out various aims of education. The aims envisaged are largely similar to those of article 26(2) UDHR, article 13(1) ICESCR and article 29(1) CRC. Principle II refers, in effect, to the promotion of understanding, tolerance and friendship among various groups and persons and the development of respect for the principles enshrined in the UN Charter. Principle VI also refers to these aims and, additionally, to the full development of the human personality and the strengthening of respect for human rights and fundamental freedoms. New, however, is the reference in Principle VI to the development of a sense of responsibility in young persons.[247]

Provisions on education also feature in declarations which concern development and social progress. On 11 December 1969, the UN General Assembly adopted the *Declaration on Social Progress and Development*.[248] Article 10(e) of the Declaration considers as one of the main goals of social progress and development, "[t]he eradication of illiteracy and the assurance of the right to universal access to culture, to free compulsory education at the elementary level and to free education at all levels; the raising of the general level of life-long education".[249] On 4 December 1986, the UN General Assembly adopted the *Declaration on the Right to Development*.[250] Article 8(1) of the Declaration appeals to states to "undertake, at the national level, all necessary measures for the realisation of the right to development and [to] ensure, *inter alia*, equality of opportunity for all in their access to basic resources, *education*, health services, food, housing, employment and the fair distribution of income . . .".[251]

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[247] See Hodgson, 1998, pp. 74–81.

[248] UNGA Resolution 2542 (XXIV) of 11 December 1969. See Hodgson, 1998, p. 53.

[249] See also arts. 11(d) and 21 of the Declaration. Art. 11(d) addresses the education of youth in the ideals of justice and peace, mutual respect and understanding among peoples. Art. 21 addresses the training of personnel needed for social development (art. 21(a)), the extension of general, vocational and technical education which should be provided free at all levels (art. 21(b)), the raising of the general level of education (art. 21(c)), and the formulation of policies to avoid the "brain drain" and to obviate its adverse effects (art. 21(d)).

[250] UNGA Resolution 41/128 of 4 December 1986. See Hodgson, 1998, p. 53.

[251] Author's italics.

CHAPTER FIVE

THE PROTECTION OF THE RIGHT TO EDUCATION BY REGIONAL LEGAL INSTRUMENTS

1. *Introduction*[1]

This Chapter deals with the protection of the right to education by regional legal instruments. The term "instrument" refers to both treaties and soft-law documents. The relevant provisions of the legal instruments will be briefly introduced. A few words will also be said on which body supervises each particular instrument and which supervisory procedures are available.

Not only legal instruments adopted at the international level protect the right to education. The right to education is also protected in many legal instruments adopted at the regional level. Such instruments have been prepared in the European, American, African and certain other regional contexts.

As far as Europe is concerned, instruments which contain provisions on the right to education have been prepared by the Council of Europe, the European Community/Union and the Conference/Organisation on Security and Co-operation in Europe.

Best-known of the Council of Europe instruments are the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, and the European Social Charter, the latter both in its original version of 1961, as subsequently developed, and in its revised version of 1996. The right to education is protected in article 2 of *Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms* of 1952. The rights provisions of the *Revised European Social Charter*, which afford protection of educational rights, are articles 9 and 10 on the right to vocational guidance and the right to vocational training, respectively, article 7 on the right of children to protection, article 15 on the rights of disabled persons, article 17 on the right of children to social, economic and legal protection and article 19 on the rights of migrant workers and their families. The educational rights of migrant workers and their families

[1] For an overview of the protection of the right to education by regional instruments, see Hodgson, 1998, pp. 56–62. See also Hodgson, 1996, pp. 249–251. See further Gomez del Prado, 1998, paras. 53–74 and 94–115 (UN Doc. E/C.12/1998/23).

are also protected in articles 14 and 15 of the *European Convention on the Legal Status of Migrant Workers* of 1977. The Council of Europe has further adopted two instruments which deal with the protection of national minorities and the rights of persons belonging to such minorities. Whereas articles 12 to 14 of the *Framework Convention for the Protection of National Minorities* of 1995 are generally devoted to the educational rights of minorities, article 8 of the *European Charter for Regional or Minority Languages* of 1992 is devoted to the use of minority languages in education.

Various instruments of the European Union are relevant in as far as education is concerned. Articles 149 and 150 of the *Treaty Establishing the European Community* of 1957, as amended, confer competencies on the European Community in the fields of education and vocational training, respectively. Articles 7(2) and (3) and 12 of *Regulation 1612/68* and *Directive 77/486* address the education of migrant workers and their children. Additionally, the *Resolution on Freedom of Education in the European Community* of 1984, article 16 of the *Declaration of Fundamental Rights and Freedoms* of 1989 and article 14 of the *Charter of Fundamental Rights of the European Union* of 2000 protect the right to education.

Matters of education are further addressed in various instruments of the Conference/Organisation on Security and Co-operation in Europe. The Conference met for the first time at Helsinki, Finland in 1975, where it adopted the *Final Act of Helsinki* of 1975. The Act contains a section on "Co-operation and Exchanges in the Field of Education". So does the *Concluding Document of the Vienna Follow-up Meeting of the CSCE* of 1989. The latter document also protects the right to education in Principle 14 and religious rights in the sphere of education in Principle 16. Provisions on rights concerning minority education are found in Principle 68 of the Vienna Concluding Document, and in Principles 32 and 34 of the *Concluding Document of the Copenhagen Conference on the Human Dimension of the CSCE* of 1990. Another important document in this context is the *Hague Recommendations Regarding the Education Rights of National Minorities* of 1996.

Instruments which contain provisions on the right to education have been prepared in the American context by the Organisation of American States. The right to education is protected by articles 34(h), 49 and 50 of the *Charter of the Organisation of American States* of 1948, as amended, article 12 of the *American Declaration of the Rights and Duties of Man* of 1948 and article 13 of the *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights* of 1988. There are further plans to adopt an *American Declaration on the Rights of Indigenous Peoples*, protecting *inter alia* the right to education of indigenous peoples.

Instruments which protect the right to education have also been prepared in the African context by the (former) Organisation of African Unity

and the African Union. Article 17(1) of the *African Charter on Human and Peoples' Rights* of 1981, article 12 of the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* of 2003 and article 11 of the *African Charter on the Rights and Welfare of the Child* of 1990 protect the right to education.

The right to education is further recognised by instruments adopted in certain other regional contexts. Articles 41 and 30(3) of the *Arab Charter on Human Rights* of 2004 protect the right to education. So does article 27 of the *Convention on Human Rights and Fundamental Freedoms of the Commonwealth of Independent States* of 1995.

2. *Europe*

2.1. *Instruments of the Council of Europe*[2]

The Council of Europe was founded in 1949 as a European organisation to encourage co-operation between member states.[3] Article 1 of the Statute considers the aim of the Council to be the achievement of greater unity between member states in order to safeguard and realise the ideals and principles which are their common heritage and to facilitate their economic and social progress. This is to take place, in particular, by the maintenance and realisation of human rights and fundamental freedoms. The principles of the Council comprise, in terms of article 3 of the Statute, pluralist democracy, respect for human rights and the rule of law. The Council's principal organs are a Committee of Ministers, consisting of the foreign ministers of member states, a Consultative (Parliamentary) Assembly, consisting of delegations of members of national parliaments and a supporting Secretariat, headed by a Secretary-General. Member states have concluded various human rights instruments under the auspices of the Council, a number of which protect the right to education.

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[2] Many of the texts of provisions on the right to education in instruments of the Council of Europe may be found in Fernandez, 1998. The texts of instruments of the Council of Europe are available on the website of the Council (www.coe.int). See also the website of the Human Rights Library of the University of Minnesota (www1.umn.edu/humanrts/index.html).

[3] See the *Statute of the Council of Europe* (1949) ETS No. 1, which entered into force on 3 August 1949.

2.1.1. *Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms*

In 1950, the Council of Europe adopted the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR).[4] The ECHR mainly guarantees civil and political rights. It does not protect the right to education. Article 2 of *Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms* (P-1 ECHR) of 1952, however, protects the right to education.[5] Article 2 states:

> No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

Previously, the observance of obligations undertaken by states parties under the ECHR was ensured by a European Commission of Human Rights and a European Court of Human Rights.[6] Commission and Court were competent to consider complaints by states parties to the effect that another state party had allegedly breached the provisions of the Convention, and also petitions from persons, NGOs or groups of individuals who/which claimed to be victims of a violation of their rights under the Convention by a state party.[7] Protocol No. 11 to the European Convention for the

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[4] European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) ETS No. 5, entered into force on 3 September 1953.

[5] Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (1952) ETS No. 9, entered into force on 18 May 1954. On the protection of the right to education by the Protocol, see Bannwart-Maurer, 1975, Hornyik, 1983, pp. 631–641, Wildhaber, 1986 (4th revision service 2000), pp. 1–51, Clarke, 1987, pp. 28–50, Lonbay, 1988, pp. 474–661, Palm-Risse, 1990, pp. 367–386, Coomans, 1992, pp. 58–78 and pp. 163–188, Lonbay, 1992, pp. 167–169, Wildhaber, 1993, pp. 531–551, Harris, O'Boyle and Warbrick, 1995, pp. 540–549, Frowein and Peukert, 1996, pp. 828–834, Gomien, Harris and Zwaak, 1996, pp. 324–330, Jacobs and White, 1996, pp. 260–268, Van Dijk and Van Hoof, 1998, pp. 643–655, Gomez del Prado, 1998, para. 53 (UN Doc. E/C.12/1998/23), Hodgson, 1998, pp. 56–57 and Bradley, 1999, pp. 395–408.

[6] See art. 19 ECHR, unamended.

[7] See section III ECHR, unamended, on the Commission, and section IV ECHR, unamended, on the Court. The interstate petition procedure was provided for in art. 24, the individual petition procedure in art. 25. The latter procedure was optional (art. 25). The procedure before Commission and Court was fairly complicated. The Commission would examine the matter and assist the parties to secure a friendly settlement (art. 28). If the Commission acknowledged the failure of efforts for a friendly settlement (art. 47), it, any of the states parties involved or the person/NGO/group of individuals who/which had submitted the petition could bring the case before the Court (art. 48, as amended by art. 5 Protocol No. 9 to the ECHR of 1990), which would then decide it (art. 50, first phrase). The Court's jurisdiction had to be specifically recognised, however (art. 46). Judgements of the Court were final (art. 52). Where the case was not brought before the Court, the Committee of Ministers would eventually decide the matter (art. 32(1)). States parties undertook to abide by decisions of the Court (art. 53), alternatively, by decisions of the Committee

Protection of Human Rights and Fundamental Freedoms of 1994,[8] however, has now replaced Commission and Court with only one supervisory organ, a new European Court of Human Rights, whose structures and functions have been redefined.[9] The new Court took up its functions on 3 November 1998. The Court is competent to deal with interstate cases[10] and individual applications[11] (submitted by persons, NGOs or groups of individuals).[12] Both the interstate and the individual petition procedure apply automatically.[13]

Of all international/regional human rights regimes, that created by the ECHR is the most advanced. This is so by virtue of the fact that provisions of the ECHR can be authoritatively interpreted by a Court of Human Rights. The Court of Human Rights, created by the ECHR, is a judicial body in the strict sense of the word. It is composed of judges who must be legal experts with legal qualifications and who serve in their individual capacity.[14] Judgements of the Court are final and binding.[15] The Committee of Ministers further ensures that judgements are actually executed.[16] It is for this reason that article 2 P-1 ECHR on the right to education and the case law produced by Commission and Court on article 2 should be dealt

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of Ministers (art. 32(4)), in disputes to which they were parties. The Committee of Ministers supervised the execution of Court judgements (art. 54), alternatively, of Committee decisions (art. 32(2) and (3)).

[8] Protocol No. 11 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (1994) ETS No. 155, entered into force on 1 November 1998.

[9] Art. 19 ECHR, as amended by Protocol No. 11.

[10] Art. 33 ECHR, as amended by Protocol No. 11.

[11] Art. 34 ECHR, as amended by Protocol No. 11.

[12] The Court, in effect a Chamber of the Court of seven judges, examines the case and assists the parties to secure a friendly settlement (arts. 38 and 39, as amended by Protocol No. 11). If a friendly settlement is not effected, the Court decides the case (art. 41, first phrase, as amended by Protocol No. 11). In exceptional cases, *i.e.* if the case raises a serious question affecting the interpretation or application of the Convention or a serious issue of general importance, any party to the case may request that the case be referred to a Grand Chamber of the Court of seventeen judges, which will then decide the case by means of a judgement (art. 43, as amended by Protocol No. 11). Judgements of a Chamber in cases not referred to a Grand Chamber and judgements of a Grand Chamber are final (art. 44, as amended by Protocol No. 11). States parties undertake to abide by decisions of the Court in cases to which they are parties (art. 46(1), as amended by Protocol No. 11). The Committee of Ministers supervises the execution of judgements (art. 46(2), as amended by Protocol No. 11).

[13] On the supervision of the ECHR prior and subsequent to the adoption of Protocol No. 11, see Gomez del Prado, 1998, paras. 94–97 (UN Doc. E/C.12/1998/23).

[14] Art. 39(3) ECHR, unamended/art. 21(1) and (2) ECHR, as amended by Protocol No. 11.

[15] Arts. 52 and 53 ECHR, unamended/arts. 44 and 46(1) ECHR, as amended by Protocol No. 11.

[16] Art. 54 ECHR, unamended/art. 46(2) ECHR, as amended by Protocol No. 11.

with in some detail, in this and subsequent chapters.[17] The discussion which follows, will focus on the following issues:

- the relationship between the first and the second sentence of article 2 P-1 ECHR;
- the meaning of the term "education" in article 2 P-1 ECHR;
- the nature and scope of the right to education in the first sentence of article 2 P-1 ECHR, in particular the nature of state obligations;
- the nature and scope of parental rights concerning education in the second sentence of article 2 P-1 ECHR, in particular the nature of state obligations; and
- the subjection of article 2 P-1 ECHR to limitations by states parties.

2.1.1.1. *The relationship between the first and the second sentence of article 2 P-1 ECHR*

Article 2 P-1 ECHR encompasses two different, though interconnected, rights. The first sentence protects the right to education, the second the right of parents to ensure the education of their children in conformity with their own religious and philosophical convictions. The right to education is the primary right. The right of parents, that their religious and philosophical convictions be respected, forms a constituent part of the right to education.[18] The European Court of Human Rights has held that "Article 2 constitutes a whole that is dominated by its first sentence, the right set out in the second sentence being an adjunct of the fundamental right to education".[19] The Court has further stated that "the second sentence of Article 2 must be read together with the first which enshrines the right of everyone to education. It is onto this fundamental right that is grafted the right of parents to respect for their religious and philosophical convictions . . .".[20] Parents are entitled and obliged to raise and educate their children. In the process of doing so, they may demand the state to respect their religious and philosophical convictions. The right of the child to receive education precedes the right of parents, however. Formulated in the converse, the right of parents may not prejudice the fundamental right of the child to education.[21]

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[17] See, in particular, 9.3.3.2. *infra* (concerning language rights in education) and 10.5. *infra* (concerning the freedom aspect of the right to education).

[18] See Van Dijk and Van Hoof, 1998, p. 643.

[19] *Campbell and Cosans v. United Kingdom*, Judgement of 25 February 1982, Publications of the European Court of Human Rights, Series A, Vol. 48, para. 40.

[20] *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, Judgement of 7 December 1976, Publications of the European Court of Human Rights, Series A, Vol. 23, para. 50.

[21] See Wildhaber, 1986/2000, pp. 6–7, para. 13 and p. 21, para. 68.

2.1.1.2. *The meaning of the term "education" in article 2 P-1 ECHR*

The first sentence of article 2 P-1 ECHR refers to the right to "education". In the case of *Campbell and Cosans v. United Kingdom*, the European Court of Human Rights defined the term "education" as follows:

> [T]he education of children is the whole process whereby, in any society, adults endeavour to transmit their beliefs, culture and other values to the young . . .[22]

The second sentence of article 2 refers to parental rights concerning "education and teaching". The Court defined the term "teaching" more narrowly:

> [T]eaching or instruction refers in particular to the transmission of knowledge and to intellectual development.[23]

It has been argued quite correctly that the Court's definition of the term "education" focuses too much on the interests of adults/parents.[24] Education, it should be held, must also involve "[leading] the child to the realisation of its self, to an independent and critical judgement, to tolerance and spontaneous initiative".[25]

Article 2 P-1 ECHR does not specify which levels of education it includes. In the "*Belgian Linguistic Case*", the former European Commission of Human Rights stated that the right to education "includes entry to nursery, primary, secondary and higher education".[26] Subsequently, the Commission adopted the view that the right to education was concerned primarily with elementary education.[27] This position is corroborated neither by the text of article 2 nor by the Court's case law.[28] It is customary in European education systems for primary and secondary education to be compulsory. To guarantee the *status quo* only at the lower level of primary education would conflict with an interpretation of article 2 in accordance with the "*effet utile*" principle, which entails that the protection of human rights should be effective.[29] The better view, therefore, is that article 2 includes all levels of education.[30]

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[22] *Campbell and Cosans v. United Kingdom*, see note 19, para. 33.

[23] *Idem*.

[24] Wildhaber, 1986/2000, p. 9, para. 21 points out that the Court's parents-focused definition of the term "education" does not quite tally with its opinion that the right to education in art. 2 P-1 ECHR is the primary right.

[25] Wildhaber, 1993, p. 531. See also Delbrück, 1992, pp. 93–94.

[26] *Case "relating to certain aspects of the laws on the use of languages in education in Belgium" (Merits)*, Judgement of 23 July 1968, Publications of the European Court of Human Rights, Series A, Vol. 6, p. 22.

[27] See, for example, Commission, Application No. 5962/72, *X v. United Kingdom*, DR 2 (1975), p. 50.

[28] See Van Dijk and Van Hoof, 1998, p. 644.

[29] See Wildhaber, 1986/2000, pp. 9–10, paras. 22–23.

[30] See Wildhaber, 1986/2000, pp. 9–10, paras. 22–23 and Van Dijk and Van Hoof, 1998, p. 644.

2.1.1.3. *The nature and scope of the right to education in the first sentence of article 2 P-1 ECHR, in particular the nature of state obligations*

The negative formulation of the first sentence of article 2 P-1 ECHR ("*no person shall be denied* the right to education") seems to imply that the freedom aspect of the right to education rather than its social aspect is involved here.[31] The former entails negative, the latter positive state obligations.

Indeed, a study of the *travaux préparatoires* of article 2 supports a negative construction of the right to education.[32] The Committee of Experts on Human Rights, to which the Committee of Ministers had entrusted the task of preparing a draft text for a Protocol to the ECHR in November 1950, changed the formulation "[e]very person has the right to education", which had originally been proposed by the Consultative Assembly, to its present negative form, as it considered it unrealistic to expect states parties to ensure that every person within their territory received education.[33] Reference was made, in particular, to persons living in remote areas, children living on ships and illiterate adults.[34] A majority of experts held that "the right to education referred only to the right of parents to make their own choice of the type of education which they wished their children to receive".[35] In effect, the right to education was restricted to its freedom aspect, *i.e.* the right of parents to make a choice concerning the education of their children.[36]

In the *Belgian Linguistic Case*,[37] the European Court of Human Rights commented on the nature of the right to education in the first sentence

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[31] See Van Dijk and Van Hoof, 1998, p. 644.

[32] For a discussion of the *travaux préparatoires* of art. 2 P-1 ECHR, see Coomans, 1992, pp. 58–78, particularly at pp. 66–69 concerning the social aspect of the right to education.

[33] See Travaux Prép., Vol. VII, p. 202 (22 February 1951).

[34] See Coomans, 1992, p. 67.

[35] See Travaux Prép., Vol. VII, p. 202 (22 February 1951).

[36] The Secretariat-General confirmed the interpretation of the Committee of Experts on Human Rights, in terms of which the right to education entailed only negative state obligations. It stated, "[W]hile education is provided by the State for children, as a matter of course, in all member States, it is not possible for them to give an unlimited guarantee to provide education . . .". See Travaux Prép., Vol. VIII, p. 10 (18 September 1951). That states were not obliged to take positive measures was emphasised also by the Committee on Legal and Administrative Questions, a functional commission of the Consultative Assembly involved in the drafting of the ECHR and the Protocol. It stated, "If it is feared that any other formula would imply the duty of the State to establish or to support out of public funds, in whole or in part, schools corresponding to the various trends of opinion in the population, the Committee can only repeat . . . that this question should be considered as being entirely outside the scope of the Convention or the Protocol". See Travaux Prép., Vol. VIII, p. 24 (2 October 1951). These words refer to the absence of state obligations concerning the establishing or subsidising of private education based on religious or philosophical convictions. See Coomans, 1992, p. 68.

[37] *Case "relating to certain aspects of the laws on the use of languages in education in Belgium" (Merits)*, Judgement of 23 July 1968, Publications of the European Court of Human Rights,

of article 2 P-1 ECHR. The Court stated that "[t]he negative formulation indicates, as is confirmed by the 'preparatory work' . . . that the Contracting Parties do not recognise such a right to education as would require them to establish at their own expense, or to subsidise, education of any particular type or at any particular level".[38] Rather, the Court held, the right to education entailed "guaranteeing to persons subject to the jurisdiction of the Contracting Parties the right, in principle, to avail themselves of the means of instruction existing at a given time".[39]

The Court further considered that "the right to education would be meaningless if it did not [also] imply in favour of its beneficiaries, the right to be educated in the national language or in one of the national languages, as the case may be".[40] And, it added that "[f]or the 'right to education' to be effective, it is further necessary that, *inter alia*, the individual who is the beneficiary should have the possibility of drawing profit from the education received, that is to say, the right to obtain, in conformity with the rules in force in each State, and in one form or another, official recognition of the studies which he has completed".[41]

According to the Court, therefore, the first sentence of article 2 P-1 ECHR entails the following three rights:

1. a right to non-discriminatory access to educational institutions existing at a given time;
2. a right to receive education in a national language; and
3. a right to official recognition of studies successfully completed.[42]

The right to education under the First Protocol is, consequently, mainly a freedom of access to existing educational institutions, a right to equal access and utilisation of educational facilities without discriminatory restrictions. Generally, a person cannot deduce from the first sentence of article 2 P-1 ECHR a right to demand from the state that it set up and finance nurseries, primary or secondary schools, comprehensive or special schools, language schools, vocational schools or universities.[43]

Series A, Vol. 6. See the discussions of this case by Suy, 1969, pp. 240–247, Wildhaber, 1969–1970, pp. 9–38 and Khol, 1970, pp. 263–301.

[38] *Belgian Linguistic Case*, see note 37, p. 31, para. 3.

[39] *Idem*.

[40] *Idem*.

[41] *Ibidem* at p. 31, para. 4.

[42] See Wildhaber, 1986/2000, p. 11, para. 28.

[43] See *ibidem* at pp. 11–12, para. 29. The state is not obliged to establish or subsidise schools in which education is provided in a given language (*Belgian Linguistic Case*, see note 37, p. 42, para. 7), to guarantee the availability of schools which are in accordance with a specific religious conviction of the parents (Commission, Application No. 7527/76, *X and Y v. United Kingdom*, DR 11 (1978), p. 147 (150)), to subsidise private denominational schools (Commission, Application No. 11533/85, *Ingrid Jordebo Foundation of Christian Schools*

It must, nevertheless, be held that the first sentence of article 2 P-1 ECHR also gives rise to positive obligations. To hold otherwise would render the right to education futile. It has been pointed out that, as a rule, primary and secondary education are compulsory in European education systems. It may be accepted, therefore, that states tacitly consider themselves obliged to ensure that public schools, which guarantee a minimum of education, are available. It must be held, therefore, that article 2 entails for states a positive obligation to guarantee this minimum of education.[44] It has also been stated:

> In the conditions of modern society solely the state is in a position to guarantee an appropriate system of education for the whole population. Article 2 must be understood to mean that this also is a duty of the state which flows from the right of every child to education.[45]

The exercise of the right to education, conceived as a right of equal access, presupposes the existence of a minimum of education provided by the state, since otherwise that right would be illusory. If a person is denied the opportunity of receiving minimal education, this involves far-reaching consequences for the development of the person and for the ability to enjoy the rights and freedoms of the ECHR. A mere negative construction of the right to education in the first sentence of article 2 P-1 ECHR would conflict with the general purpose of the Convention, which is the effective protection of human dignity and human rights. It is in the light of this general purpose that article 2 must be interpreted![46]

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and Ingrid Jordebo v. Sweden, DR 51 (1987), p. 125 (128)) or to provide for particular types of adult education (Commission, Application No. 7010/75, *X v. Belgium*, DR 3 (1976), p. 162 (164)). Note should, however, be taken of the Court's recent judgement in *Cyprus v. Turkey*, European Court of Human Rights (Grand Chamber), Judgement of 10 May 2001, Reports of Judgements and Decisions 2001–IV, which appears to recognise positive state obligations in the sphere of education in certain circumstances. The Court appears to recognise a right to receive education in a non-national language in appropriate cases. This case will be discussed at 9.3.3.2. *infra*.

[44] See Wildhaber, 1986/2000, p. 12, para. 31.

[45] Frowein and Peukert, 1996, p. 829. Own translation from original German text, "Unter den Bedingungen der modernen Gesellschaft ist allein der Staat in der Lage, ein angemessenes Ausbildungssystem für die ganze Bevölkerung zu gewährleisten. Art. 2 muß dahin verstanden werden, daß dieses auch eine dem Recht auf Ausbildung jedes Kindes entsprechende Pflicht des Staates ist". See also the words of Khol, 1970, p. 285, who states, "It would be largely out of touch with life and almost absurd, having regard to the social structures and the basic truths of state life in the contemporary world, to guarantee a right to education and at the same time to release the state—who alone can assure the enjoyment of such a right—from all positive duties". Own translation from original German text, "[E]s wäre reichlich lebensfremd und nahezu absurd, bei den heutigen sozialen Strukturen und Grundtatsachen staatlichen Lebens ein Recht auf Erziehung zu verbürgen und zugleich den Staat—der einzig den Genuß eines solchen Rechtes sicherstellen kann—von jeder Handlungspflicht zu befreien".

[46] See Van Dijk and Van Hoof, 1998, p. 647.

A closer examination of the judgement of the European Court of Human Rights in the *Belgian Linguistic Case* reveals that the Court implicitly accepted that the right to education also included positive obligations. The Court stated:

> [The Court] notes in this context that all member States of the Council of Europe possessed, at the time of the opening of the Protocol to their signature, and still do possess, a general and official educational system. There neither was, nor is now, therefore, any question of requiring each State to establish such a system, but merely of guaranteeing to persons subject to the jurisdiction of the Contracting Parties the right, in principle, to avail themselves of the means of instruction existing at a given time.[47]

These words imply that states parties to the ECHR and the First Protocol do not have a positive obligation to establish a general educational system in so far as such a system is already in place. Where such a system is not in place, however, it would have to be developed.[48]

In its deliberations, the Court did not attach much significance to the *travaux préparatoires* of article 2. It therefore refrained from regarding the right to education as a mere freedom right which requires state restraint.[49] On the contrary, the Court adopted a dynamic interpretation.[50] It emphasised the general aim of the ECHR, which was to provide effective protection of fundamental human rights. It referred to the social and technical developments of the time which could make it necessary to adapt the interpretation of provisions of the Convention to secure an effective protection

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[47] *Belgian Linguistic Case*, see note 37, p. 31, para. 3.

[48] See Lonbay, 1988, p. 633. At p. 633, Lonbay further opines that the Court's words to the effect that there was no state duty "to establish . . ., or to subsidise, education of any *particular* type or at any *particular* level" might well be construed to mean that there is, in fact, a state duty to establish education of a *general* type and at a *general* level. He also points out, quite correctly, that "[i]f one has the right to be educated in a national language, one must first have the right to be educated at all". Similarly, "the right to obtain official recognition of studies . . . presupposes that education has taken place". See Lonbay, 1988, p. 634.

[49] Judge Wold, in his dissenting opinion, considered the interpretation by the majority of the Court, in terms of which positive state obligations were implicit in art. 2 P-1 ECHR, not to have a basis in the Convention. In his view, art. 2 was exclusively a freedom right which only encompassed negative state obligations. He stated that "this right cannot go further than to a freedom for the individual to choose the education he wants without interference by the State". Judge Wold also argued that "[t]he scholastic system of the member States is the internal, national concern of each of them: it is entirely outside the scope of the Convention. It was also during the Preparatory Works expressly pointed out that the Convention should not affect the internal scholastic organisation of States". *Belgian Linguistic Case*, see note 37, pp. 104–106 (Dissenting Opinion Judge Wold).

[50] Khol, 1970, pp. 279–283 states that the Court adopted an objective-teleological interpretation, a dynamic interpretation directed at the effective protection of human rights, as opposed to a subjective interpretation, focusing exclusively on the historical will of states parties.

of human rights.[51] It is on this basis that the Court found that article 2 "[i]n spite of its negative formulation, . . . uses the term 'right' and speaks of a 'right to education'. . . . There is therefore no doubt that Article 2 . . . does enshrine a right"[52] and, further, that this right also had a hidden positive aspect. Where the minimal provision of education in a state party is affected, positive obligations arise under the first sentence of article 2 P-1 ECHR.

2.1.1.4. *The nature and scope of parental rights concerning education in the second sentence of article 2 P-1 ECHR, in particular the nature of state obligations*

The second sentence of article 2 P-1 ECHR obliges states parties, in the exercise of any functions which they assume in relation to education and teaching, to respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.[53] The provision does not distinguish between state and private education. Accordingly, states parties must respect parental convictions in the context of both state and private education. It consequently does not suffice for states parties to indicate that they guarantee the freedom to establish and maintain private schools. Respect must also be shown in as far as state education is concerned,[54] also because private schools need not teach in a strictly neutral, objective and pluralistic manner.[55]

It may be asked what is meant by the term "to respect". During the drafting of article 2, the initial phrase "to have regard to" was subsequently replaced with the present term "to respect". The phrase "to have regard to" was considered not to have a legal meaning. It was perceived to be too vague. The term "to respect" was held to express a stronger sense of legal obligation.[56] According to the European Court of Human Rights, the term "to respect" signifies more than a mere negative freedom. It also implies positive obligations. In the words of the Court:

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[51] *Belgian Linguistic Case*, see note 37, p. 32, para. 5.

[52] *Ibidem* at p. 31, para. 3.

[53] For a discussion of the *travaux préparatoires* of art. 2 P-1 ECHR, see Coomans, 1992, pp. 58–78, particularly at pp. 70–78 concerning the freedom aspect of the right to education.

[54] See *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, Report of the Commission of 21 March 1975, Publications of the European Court of Human Rights, Series B, Vol. 21, p. 44, where the Commission states, ". . . Article 2 not only prohibits the State from *preventing* parents from arranging the education of their children outside the public schools, but also requires the State actively to respect parental convictions within the public schools. This requirement is then obviously not met simply by the observance by the respondent Government of the prohibition, and by the availability of private schools or alternative means of education other than the public schools".

[55] See Wildhaber, 1986/2000, p. 21, para. 69.

[56] See Travaux Prép., Vol. VIII, p. 89 (8 December 1951).

> [T]he "travaux préparatoires" do not for all that reveal the intention to go no further than [the] guarantee of [a] freedom. . . . [They] show that sight was not lost of the need to ensure, in State teaching, respect for parents' religious and philosophical convictions.[57]

The question is how the state can respect the rights of parents in public education. One method is to grant exemptions to students from subjects the content of which conflicts with the religious or philosophical convictions of parents. If they so wish, parents may thus demand that their children be exempted from religious instruction.[58] In certain cases, it must also be possible to obtain exemptions on the ground of philosophical convictions.[59] It needs to be pointed out, however, that exemptions cannot be obtained whenever a course offered touches on issues of a religious or philosophical nature. If that were so, states would not be in a position to guarantee the right to education on the basis of the functions which they exercise in the educational field in terms of article 2.[60] According to the former European Commission of Human Rights in the case of *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, where a course offered touches on issues of a religious or philosophical nature,

> [t]wo considerations seem to be of importance . . . The first is that the State must have good reasons for the introduction of a subject in the public schools which may interfere with the religious or philosophical convictions of some parents. Secondly, and most important, the State must show respect for these convictions in the way in which the subject is taught. Respect must therefore mean tolerance towards the different religious and philosophical convictions which are involved in a particular subject.[61]

The European Court of Human Rights subsequently confirmed these sentiments. It made it clear that states were not prevented from "imparting through teaching or education information or knowledge of a directly or indirectly religious or philosophical kind", but that they "must take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner" and that they were forbidden "to pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions".[62]

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[57] *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, see note 20, para. 50.

[58] See Wildhaber, 1986/2000, p. 22, para. 77. Clarke, 1987, pp. 49–50 and Coomans, 1992, p. 177 hold that compulsory religious instruction without the possibility of exemption clearly violates art. 2 P-1 ECHR.

[59] See Wildhaber, 1986/2000, p. 22, para. 78. See also Coomans, 1992, p. 177.

[60] *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, see note 54, p. 47.

[61] *Ibidem* at p. 46.

[62] *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, see note 20, para. 53, confirmed by *Campbell and Cosans v. United Kingdom*, see note 19, para. 35. See also Wildhaber, 1986/2000, p. 22, para. 78.

The exact meaning of the concept "philosophical convictions" needs to be established.[63] It is obvious that the concept must refer to something in addition to religious convictions, as otherwise its mentioning in article 2 P-1 ECHR is superfluous. In the *Belgian Linguistic Case*, the former European Commission of Human Rights considered that an examination of the *travaux préparatoires* revealed that "philosophical convictions were added to cover agnostic opinions".[64] This rather narrow construction was subsequently dropped. In the case of *Campbell and Cosans v. United Kingdom*, the Commission acknowledged that its earlier interpretation had been too strict and defined the concept more widely:

> [T]he "concept of philosophical convictions" must be understood to mean those ideas based on human knowledge and reasoning concerning the world, life, society, *etc.*, which a person adopts and professes according to the dictates of his or her conscience. These ideas can more briefly be characterised as a person's outlook on life including, in particular, a concept of human behaviour in society.[65]

The Court in the *Campbell and Cosans* case first commented on the meaning of the term "convictions":

> In its ordinary meaning the word "convictions", taken on its own, is not synonymous with the words "opinions" and "ideas", such as are utilised in Article 10 of the Convention, which guarantees freedom of expression; it is more akin to the term "beliefs" (in the French text: "convictions") appearing in Article 9—which guarantees freedom of thought, conscience and religion—and denotes views that attain a certain level of cogency, seriousness, cohesion and importance.[66]

Then the Court considered the meaning of the term "philosophical". It stated that the word "philosophy" could, on the one hand, be used to allude to "a fully-fledged system of thought" or, on the other, to "views on more or less trivial matters". The Court held that neither of these two extremes could be adopted to interpret article 2: "[T]he former would too narrowly restrict the scope of a right that is guaranteed to all parents and the latter might result in the inclusion of matters of insufficient weight or

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[63] For a discussion of the concept "philosophical convictions", see, for example, Palm-Risse, 1990, pp. 377–384.

[64] *Belgian Linguistic Case*, Opinion of the Commission of 24 June 1965, Publications of the European Court of Human Rights, Series B, Vol. 3, p. 282, para. 379.

[65] *Campbell and Cosans v. United Kingdom*, Opinion of the Commission of 16 May 1980, Publications of the European Court of Human Rights, Series B, Vol. 42, p. 37.

[66] *Campbell and Cosans v. United Kingdom*, see note 19, para. 36.

substance".[67] This having been said, the Court emphasised that article 2 did not afford protection to all "philosophical convictions". It stated:

> Having regard to the Convention as a whole, including Article 17, the expression "philosophical convictions" in the present context denotes, in the Court's opinion, such convictions as are worthy of respect in a "democratic society" . . . and are not incompatible with human dignity; in addition, they must not conflict with the fundamental right of the child to education, the whole of Article 2 being dominated by its first sentence. . . .[68]

The interpretation which Commission and Court have given to the expression "philosophical convictions" is quite extensive. Both organs have interpreted the concept in a creative way. It covers highly personal ideas of persons on life and society and man's place in society. These ideas must, however, be worthy of respect in a democratic society, they must be compatible with human dignity and they must not conflict with the child's fundamental right to education.

It may be asked whether article 2 P-1 ECHR guarantees the right to establish and maintain private schools. Neither the first nor the second sentence of article 2 expressly answers this question.[69] It has been asserted that such a right cannot necessarily be inferred from article 2, but that the question must be resolved by a study of the jurisprudence of Commission and Court.[70] In the case of *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, the matter was not directly at issue. Even so, a few interesting comments were made in this regard. The Commission took the view that the right to set up and operate private schools was protected by article 2. The Commission considered that article 2 "prohibits the State from preventing parents from arranging the education of their children outside the public school".[71] The Court in the same case held that the *travaux préparatoires* of article 2

> indisputably demonstrate . . . the importance attached by many members of the Consultative Assembly and a number of governments to freedom of teaching, that is to say, freedom to establish private schools.[72]

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[67] *Idem*.

[68] *Idem*.

[69] In view of the omission in art. 2 P-1 ECHR of a reference to the freedom to found private schools, Ireland made the following declaration when signing the Protocol, "In the view of the Irish Government, Article 2 of the Protocol is not sufficiently explicit in ensuring to parents the right to provide education for their children in their homes or in schools of the parents' own choice, whether or not such schools are private schools or are schools recognised or established by the State". See Travaux Prép., Vol. VIII, p. 204 (19 March 1952).

[70] See Van Dijk and Van Hoof, 1998, pp. 647–648.

[71] *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, see note 54, p. 44.

[72] *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, see note 20, para. 50. Also the following

Subsequently, in the case of *Ingrid Jordebo Foundation of Christian Schools and Ingrid Jordebo v. Sweden*, the Commission considered that it followed from these words of the Court that article 2 guarantees the right to start and run private schools.[73]

However, also apart from the above statements by Commission and Court on the question, it should be held that article 2 must be considered to protect the right to establish and maintain private schools. The purpose of the second sentence of article 2 is to "[safeguard] the possibility of pluralism in education, which possibility is essential for the preservation of the 'democratic society' as conceived in the Convention".[74] It has been argued that a monopoly of the state in education could safeguard pluralism in education, if state schools were organised and structured freely, pluralistically and tolerantly in such a way, that the religious and philosophical convictions of parents could be respected.[75] This is a *theoretical* possibility. *Practice* shows, however, that a state monopoly in education leads to inflexibility of a nature not tolerable in a democratic state. To permit the existence of private schools promotes a spirit of openness, of competition and of willingness to experiment.[76] Only the existence of private schools can provide the measure of flexibility necessary to respect the convictions of parents.[77] In any event, the right to set up and operate private schools is already an accepted standard in states parties to the ECHR.[78]

It must be held, therefore, that the second sentence of article 2 P-1 ECHR guarantees the right to establish and maintain private schools. The state is free, however, to determine the extent to which it recognises private schools.[79] It may also lay down standards of performance for private schools. These standards may be as high as those for state schools.[80] The state may not forbid private schools to have a particular religious or philosophical

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statement of the Court, at para. 54, seems to recognise the right to establish private schools, "[T]he Danish state preserves an important expedient for parents who, in the name of their creed or opinions, wish to dissociate their children from integrated sex education; it allows parents either to entrust their children to private schools, which are bound by less strict obligations and moreover heavily subsidised by the State . . ., or to educate them or have them educated at home, subject to suffering the undeniable sacrifices and inconveniences caused by recourse to one of those alternative solutions".

[73] Commission, Application No. 11533/85, *Ingrid Jordebo Foundation of Christian Schools and Ingrid Jordebo v. Sweden*, DR 51 (1987), p. 125 (128).

[74] *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, see note 20, para. 50.

[75] See Vasak, K., *La Convention Européenne des Droits de l'Homme*, 1964, p. 58.

[76] See Wildhaber, 1986/2000, p. 16, para. 51.

[77] See Lester, A. and D. Pannick, *Independent Schools and the European Convention on Human Rights*, 1982, pp. 10–12. In a similar vein, see Coomans, 1992, pp. 186–187.

[78] See Lester and Pannick, see note 77, pp. 14–16.

[79] See Wildhaber, 1986/2000, p. 16, para. 52.

[80] See *idem*.

leaning. But, it may prohibit schools which are totalitarian, and schools which have an orientation which is in conflict with the rights under the ECHR.[81] It may expect of private schools that they assure a minimum of openness, tolerance, pluralism and non-discrimination.[82]

The instruction to states parties that they respect parental convictions does not in any way entail an obligation to set up public, or to finance private, educational institutions which are in accordance with the particular religious or philosophical world views of parents. States parties are also not obliged to render financial support to parents who wish to send their children to private schools or to grant to such children bursaries or study grants.[83] All this is clearly borne out by the decision of the European Court of Human Rights in the *Belgian Linguistic Case*, where the Court stated that "the Contracting Parties do not recognise such a right to education as would require them to establish at their own expense, or to subsidise, education of any particular type or at any particular level".[84] It may, of course, be asked whether the current state of the law under the First Protocol, in terms of which private schools cannot lay claim to state support, is altogether acceptable. This question will be addressed, in more general terms, in a subsequent Chapter.[85]

2.1.1.5. *The subjection of article 2 P-1 ECHR to limitations by states parties*

Article 2 P-1 ECHR has not expressly been subjected to a limitation provision in the same way as, notably, articles 8 to 11 ECHR, which protect, respectively, the rights to privacy, to freedom of religion, to freedom of expression, and to freedom of assembly and association.[86] Nonetheless, in the *Belgian Linguistic Case*, the European Court of Human Rights stated as follows:

> The right to education guaranteed by the first sentence of Article 2 of the Protocol by its very nature calls for regulation by the State, regulation which

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[81] Note should be taken of art. 17 ECHR, which states, "Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention".

[82] See Wildhaber, 1986/2000, pp. 16–17, para. 52 and Palm-Risse, 1990, pp. 379–381.

[83] See Wildhaber, 1986/2000, p. 12, para. 32 and pp. 14–15, para. 46.

[84] *Belgian Linguistic Case*, see note 37, p. 31, para. 3. The state cannot be called upon to establish schools which are in accordance with a specific religious conviction of the parents (Commission, Application No. 7527/76, *X and Y v. United Kingdom*, DR 11 (1978), p. 147 (150)) nor can it be called upon to subsidise private denominational schools (Commission, Application No. 11533/85, *Ingrid Jordebo Foundation of Christian Schools and Ingrid Jordebo v. Sweden*, DR 51 (1987), p. 125 (128)).

[85] See 10.5.1.4. and 10.5.2.2. *infra*.

[86] "In time of war or other public emergency threatening the life of the nation", art. 2 P-1 ECHR may, however, be derogated from in terms of art. 15 ECHR.

> may vary in time and place according to the needs and resources of the community and of individuals. It goes without saying that such regulation must never injure the substance of the right to education nor conflict with other rights enshrined in the Convention.[87]

These words indicate that the right to education needs to be regulated and, further, that, in the process, it may be subjected to limitations. According to the Court, limitations must, firstly, not injure the substance of the right to education and, secondly, also not conflict with other rights enshrined in the ECHR.[88]

2.1.2. *The Revised European Social Charter*

In 1961, the Council of Europe adopted the *European Social Charter* (ESC).[89] The Charter protects economic, social and cultural rights. The *Additional Protocol to the European Social Charter* of 1988 extended the protection accorded to these rights under the Charter.[90] On 3 May 1996, the *Revised European Social Charter* (Revised ESC) was adopted.[91] The Revised Charter contains in one instrument all the rights protected in the Charter and the Additional Protocol of 1988 and adds thereto new rights. States parties may choose by which rights of Part II of the Revised Charter—the part containing the rights provisions of the Charter—they wish to be bound. They must, however, select not less than sixteen articles or sixty-three numbered paragraphs from Part II.[92] Both the original and the revised version of the Social Charter include provisions relevant to the right to education. Only those of the Revised Charter, namely articles 7(3), 9, 10, 15(1), 17(1)(a) and (2), and 19(11) and (12), will be referred to here.

Article 7 Revised ESC deals with *the right of children and young persons to protection*. To ensure the effective exercise of the right to protection, states parties undertake *inter alia*, "to provide that persons who are still subject to compulsory education shall not be employed in such work as would deprive them of the full benefit of their education".[93] This provision is sim-

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[87] *Belgian Linguistic Case*, see note 37, p. 32, para. 5.

[88] Wildhaber, 1986/2000, pp. 30–31, paras. 108–115 opines that a limitation provision akin to those of paras. (2) of arts. 8–11 ECHR must, on the basis of analogy, be read into art. 2 P-1 ECHR. Paras. (2) lay down, generally, that limitations must, firstly, be prescribed by law, secondly, be in the public interest and, thirdly, be necessary in a democratic society.

[89] European Social Charter (1961) ETS No. 35, entered into force on 26 February 1965.

[90] Additional Protocol to the European Social Charter (1988) ETS No. 128, entered into force on 4 September 1992.

[91] Revised European Social Charter (1996) ETS No. 163, entered into force on 1 July 1999.

[92] Art. A Part III Revised ESC.

[93] Art. 7(3) Revised ESC. Art. 7(1) expects states parties "to provide that the minimum age of admission to employment shall be 15 years, subject to exceptions for children

ilar to article 32(1) CRC, referred to above in the context of the discussion of the protection of the right to education under the CRC.[94]

Articles 9 and 10 Revised ESC protect *the right to vocational guidance* and *the right to vocational training*, respectively. Article 9[95] obligates states parties to make a vocational guidance service available to all persons. Vocational guidance should be provided *free of charge*. Article 10[96] imposes obligations on states parties to ensure the effective exercise of the right to vocational training. States parties must provide for the vocational training of all persons and "grant facilities for access to higher technical and university education, based solely on aptitude". They must also provide a system of

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employed in prescribed light work without harm to their health, morals or education". The European Committee of Social Rights, which supervises the Revised ESC, held in the case of *International Commission of Jurists v. Portugal*, Decision on the Merits of 9 September 1999, Complaint No. 1/1998, available on the website of the Council of Europe at www.coe.int, that the purpose of this provision was to protect children and adolescents against the risks associated in performing work which may have negative repercussions on *inter alia* their education. See at para. 26 of the decision. The Committee accordingly emphasised that the exception in respect of "prescribed light work" could only refer to work, the nature of which was not such as to have harmful consequences on *inter alia* the child's ability to obtain maximum advantage from schooling. See at paras. 29 and 30. The Committee then added that work considered to be "light" in nature ceased to be so if it was performed for an excessive duration. It repeated its earlier view that "a situation in which a child under the age of fifteen years works for between twenty and twenty-five hours per week during school term . . . or three hours per school day and six to eight hours on week days when there is no school is contrary to the Charter". See at para. 31.

[94] See 4.5.2. *supra*.

[95] Art. 9 Revised ESC states, "With a view to ensuring the effective exercise of the right to vocational guidance, the Parties undertake to provide or promote, as necessary, a service which will assist all persons, including the handicapped, to solve problems related to occupational choice and progress, with due regard to the individual's characteristics and their relation to occupational opportunity: this assistance should be available free of charge, both to young persons, including schoolchildren, and to adults".

[96] Art. 10 Revised ESC states, "With a view to ensuring the effective exercise of the right to vocational training, the Parties undertake: 1. to provide or promote, as necessary, the technical and vocational training of all persons, including the handicapped, in consultation with employers' and workers' organisations, and to grant facilities for access to higher technical and university education, based solely on individual aptitude; 2. to provide or promote a system of apprenticeship and other systematic arrangements for training young boys and girls in their various employments; 3. to provide or promote, as necessary: (a) adequate and readily available training facilities for adult workers; (b) special facilities for the retraining of adult workers needed as a result of technological development or new trends in employment; 4. to provide or promote, as necessary, special measures for the retraining and reintegration of the long-term unemployed; 5. to encourage the full utilisation of the facilities provided by appropriate measures such as: (a) reducing or abolishing any fees or charges; (b) granting financial assistance in appropriate cases; (c) including in the normal working hours time spent on supplementary training taken by the worker, at the request of his employer, during employment; (d) ensuring, through adequate supervision, in consultation with the employers' and workers' organisations, the efficiency of apprenticeship and other training arrangements for young workers, and the adequate protection of young workers generally".

apprenticeship. Provision must be made for adequate training facilities for adult workers and special facilities for the retraining of adult workers needed as a result of technological development. Provision must also be made for special measures to retrain and reintegrate the long-term unemployed. The full utilisation of vocational training facilities is to be encouraged by measures, such as reducing or abolishing fees or charges, granting financial assistance, including in the normal working hours time spent on supplementary training taken by the worker at the request of the employer during employment, and ensuring, through adequate supervision, the efficiency of apprenticeship and other training arrangements.

Article 15 Revised ESC addresses *the right of persons with disabilities to independence, social integration and participation in the life of the community*. The right accrues to all persons with disabilities, irrespective of age and the nature and origin of their disabilities. Paragraph (1) directs states parties "to take the necessary measures to provide persons with disabilities with guidance, education and vocational training in the framework of general schemes wherever possible or, where this is not possible, through specialised bodies, public or private". Like Rule 6 Standard Rules on the Equalisation of Opportunities for Persons with Disabilities, article 15(1) supports the view that persons with disabilities should, if possible, be educated in integrated settings in mainstream educational institutions and that special education should be seen as the exception rather than the rule.[97]

Article 17 contains *the right of children and young persons to social, legal and economic protection*. In terms of article 17, states parties must ensure that children and young persons "grow up in an environment which encourages the full development of their personality and of their physical and mental capacities". Article 17(1)(a) directs states parties "to take all appropriate and necessary measures designed", "to ensure that children and young persons, taking account of the rights and duties of their parents, have the care, the assistance, the education and the training they need, in particular by providing for the establishment or maintenance of institutions and services sufficient and adequate for this purpose". Article 17(2) further instructs states parties "to take all appropriate and necessary measures designed", "to provide to children and young persons a free primary and secondary education as well as to encourage regular attendance at schools". The right to free primary and secondary education was only introduced with the revision of the ESC in 1996. From the perspective of the protection of the right to education, the inclusion of the latter right in the Revised ESC is most significant, as it adds the economic and social dimen-

[97] See 4.8.3. *supra*.

sions of the right to education, previously missing in the Council of Europe.[98] It should be noted that of all international and regional human rights agreements, the Revised ESC provides the most far-reaching guarantee concerning free education, since it states that not only primary but also secondary education must be free.

Article 19, finally, concerns *the right of migrant workers and their families to protection and assistance*. To ensure the effective exercise of the right, states parties undertake *inter alia*, under paragraph (11), "to promote and facilitate the teaching of the national language of the receiving state or, if there are several, one of these languages, to migrant workers and members of their families" and, further, under paragraph (12), "to promote and facilitate, as far as practicable, the teaching of the migrant worker's mother tongue to children of the migrant worker". Similar provisions are encountered in articles 14(2) and 15 of the European Convention on the Legal Status of Migrant Workers, respectively, to be referred to below.

The supervision of the Revised ESC is entrusted to a Committee of Independent Experts, in practice called the European Committee of Social Rights.[99] The Committee is competent to consider state reports[100] and to hear collective complaints, *i.e.* complaints by specified organisations.[101]

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[98] See the discussion of art. 2 P-1 ECHR at 5.2.1.1. *supra*. See also Tomaševski, 2001c, p. 11.

[99] The supervision of the Revised ESC is submitted to the same system of control as the ESC of 1961, as developed by the Protocol of 1991 and by the Protocol of 1995 (see Part IV Revised ESC). The Protocol of 1991, *i.e.* the *Protocol Amending the European Social Charter* (1991) ETS No. 142 (not in force yet) strengthens the role of the Committee of Independent Experts. As of 6 January 2005, there have been twenty-one ratifications, those of all states parties to the ESC being required for the Protocol to enter into force. The Protocol of 1995, *i.e.* the *Additional Protocol to the European Social Charter Providing for a System of Collective Complaints* (1995) ETS No. 158 (entered into force on 1 July 1998) provides for a system of collective complaints.

[100] Once the 1991 Protocol is in force, the reporting procedure will take on the following form: States parties must submit reports concerning the application of provisions of the ESC (arts. 21 and 22 ESC). National social organisations (organisations of employers and trade unions) may add their comments on these reports (art. 23(1) ESC). The reports are examined by the Committee of Independent Experts, which, on completion of its examination, draws up a report containing its *Conclusions* with regard to each state party concerned (art. 24 ESC). The reports of states parties and the conclusions of the Committee of Independent Experts are then submitted to a Governmental Committee (art. 27(1) ESC), which, on the basis of the reports and conclusions, prepares a report to the Committee of Ministers, in which it makes suggestions for recommendations to each state party concerned (art. 27(3) ESC). Based on the report, the Committee of Ministers adopts a resolution containing, amongst others, individual recommendations to the states parties concerned (art. 28(1) ESC). The Parliamentary Assembly further holds periodical plenary debates with regard to the reporting process (art. 29 ESC).

[101] Collective complaints alleging unsatisfactory application of the ESC may be submitted by specified organisations of employers, trade unions and NGOs (arts. 1–3 Protocol of 1995). Complaints are examined by the Committee of Independent Experts (art. 7 Protocol), which, after consideration of a complaint, draws up a report containing its *Decision on the*

Supervision is fairly complicated and further involves a Governmental Committee, the Committee of Ministers and the Parliamentary Assembly.

The European Committee of Social Rights has recently decided a case, in which it addressed various aspects of the right to education. In the case of *Autism—Europe v. France*,[102] Autism—Europe asked the Committee to rule that France was failing to satisfactorily apply its obligations under article 15(1) Revised ESC (which recognises the right to education of persons with disabilities) and article 17(1) Revised ESC (which *inter alia* generally sets out the right to education), because children and adults with autism did not effectively exercise their right to education in mainstream schooling or through adequately supported placements in specialised institutions. The Committee was also called upon to rule that the situation in France violated articles 15(1) and 17(1) when read in combination with article E of Part V of the Revised ESC (which embodies the non-discrimination principle), since persons with autism did not benefit from the right to education on an equal basis with other persons. The Committee adopted a progressive approach with regard to the rights of persons with disabilities. This is reflected particularly in its comments on article 15. The Committee thus stated:

> [T]he Committee views Article 15 of the Revised Charter as both reflecting and advancing a profound shift of values in all European countries over the past decade away from treating [persons with disabilities] as objects of pity and towards respecting them as equal citizens. . . . The underlying vision of Article 15 is one of equal citizenship for persons with disabilities and, fittingly, the primary rights are those of "independence, social integration and participation in the life of the community". Securing a right to education for children and others with disabilities plays an obviously important role in advancing these citizenship rights. This explains why education is now specifically mentioned in the revised Article 15 and why such an emphasis is placed on achieving that education "in the framework of general schemes, wherever possible". It should be noted that Article 15 applies to all persons with disabilities regardless of the nature and origin of their disability and irrespective of their age. It thus clearly covers both children and adults with autism.[103]

Merits, which it submits to the Committee of Ministers (art. 8 Protocol). On the basis of the report, the Committee of Ministers adopts a resolution. If the Committee of Independent Experts finds that the ESC has not been applied in a satisfactory manner, the Committee of Ministers must adopt a recommendation addressed to the state party concerned (art. 9 Protocol). The state party concerned must provide information on the measures it has taken to give effect to the recommendation of the Committee of Ministers in its next report (art. 10 Protocol).

[102] *Autism—Europe v. France*, European Committee of Social Rights, Decision on the Merits of 4 November 2003, Complaint No. 13/2002, available on the website of the Council of Europe at www.coe.int.

[103] *Ibidem* at para. 48.

Commenting on article 17, the Committee emphasised that this provision sought to guarantee that children and young persons grew up in an environment which encouraged the full development of their personality and physical and mental capacities. According to the Committee, such an approach was as important for children with disabilities as it was for others—in fact, more so, where the effects of ineffective or untimely intervention were ever likely to be undone. On this basis then, the Committee expressed its view that article 17 also embodied the modern approach of mainstreaming.[104] The Committee went on to deal with the topic of non-discrimination. It stated that the principle of equality meant "treating equals equally and unequals unequally". To the extent necessary, states parties were, therefore, obliged to adopt special measures in respect of persons with disabilities in the field of education to ensure to them real and effective equality in the exercise of the right to education.[105] Finally, the Committee made the following statement regarding the implementation of the Charter:

> [T]he implementation of the Charter requires the States Parties to take not merely legal action but also practical action to give full effect to the rights recognised in the Charter. When the achievement of one of the rights in question is exceptionally complex and particularly expensive to resolve, a State Party must take measures that allow it to achieve the objectives of the Charter within a reasonable time, with measurable progress and to an extent consistent with the maximum use of available resources.[106]

In the light of the above considerations, the Committee held that France had failed to achieve sufficient progress in advancing the right to education of persons with autism. The proportion of children with autism educated in general or specialist schools was much lower than in the case of other children and there was also a chronic shortage of care and support facilities for autistic adults.[107] The Committee thus concluded that the situation constituted a violation of articles 15(1) and 17(1) whether alone or read in combination with article E Revised ESC.

2.1.3. *The European Convention on the Legal Status of Migrant Workers*

Another instrument of the Council of Europe which contains provisions on the right to education is the *European Convention on the Legal Status of Migrant Workers* of 1977.[108] Articles 14 and 15 are entitled "Pretraining—Schooling—

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[104] *Ibidem* at para. 49.
[105] *Ibidem* at para. 52.
[106] *Ibidem* at para. 53.
[107] *Ibidem* at para. 54.
[108] European Convention on the Legal Status of Migrant Workers (1977) ETS No. 93, entered into force on 1 May 1983.

Linguistic training—Vocational training and retraining" and "Teaching of the migrant worker's mother tongue", respectively. In terms of article 14,[109] migrant workers and members of their families, who have been *officially admitted* to the territory of a state party, are entitled, on the same basis and under the same conditions as national workers, to general education and vocational training and retraining and must further be granted access to higher education according to the general regulations governing admission to respective institutions in the state party concerned.[110] To promote access to general and vocational schools, states parties must facilitate the teaching of their language to migrant workers and members of their families.[111] Under article 15,[112] states parties must take action[113] to arrange for

[109] Art. 14 states, "1. Migrant workers and members of their families officially admitted to the territory of a Contracting Party shall be entitled, on the same basis and under the same conditions as national workers, to general education and vocational training and retraining and shall be granted access to higher education according to the general regulations governing admission to respective institutions in the receiving State. 2. To promote access to general and vocational schools and to vocational training centres, the receiving State shall facilitate the teaching of its language or, if there are several, one of its languages to migrant workers and members of their families. 3. For the purpose of the application of paragraphs 1 and 2 above, the granting of scholarships shall be left to the discretion of each Contracting Party which shall make efforts to grant the children of migrant workers living with their families in the receiving State—in accordance with the provisions of Article 12 of this Convention—the same facilities in this respect as the receiving State's nationals. 4. The workers' previous attainments, as well as diplomas and vocational qualifications acquired in the State of origin, shall be recognised by each Contracting Party in accordance with arrangements laid down in bilateral and multilateral agreements. 5. The Contracting Parties concerned, acting in close co-operation shall endeavour to ensure that the vocational training and retraining schemes, within the meaning of this Article, cater as far as possible for the needs of migrant workers with a view to their return to their State of origin".

[110] Compare the equivalent provisions, arts. 30, 43(1) and 45(1), of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, discussed at 4.7.2. *supra.* The protection under the European Convention appears to be wider in as far as it refers to an entitlement to education/vocational training and not, like the International Convention, to a right of *access to* education/vocational training. However, in as far as the International Convention grants a right of access to education to the children of migrant workers, irrespective of the regularity or otherwise of their or their parents' situation, the protection under the International Convention appears to be wider than under the European Convention, which requires migrant workers and members of their families to have been *officially admitted* to the territory of a state party.

[111] Compare art. 45(2) International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, which in the context only refers to the children of migrant workers.

[112] Art. 15 states, "The Contracting Parties concerned shall take actions by common accord to arrange, so far as practicable, for the migrant worker's children, special courses for the teaching of the migrant worker's mother tongue, to facilitate, *inter alia*, their return to their State of origin".

[113] Compare art. 45(3) International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families. Art. 45(4) further stipulates that states of employment may provide special schemes of education *in* the mother tongue of children of migrant workers.

the migrant worker's children special courses for the teaching of the migrant worker's mother tongue.[114]

2.1.4. *The Framework Convention for the Protection of National Minorities*

In 1994, the Council of Europe adopted the *Framework Convention for the Protection of National Minorities*.[115] A number of its provisions are relevant to the right to education. It needs to be pointed out that the protection of the Convention applies to *national* minorities only.[116]

Article 6(1) of the Convention introduces the notion of "intercultural dialogue" and calls upon states parties to promote mutual respect, understanding and co-operation among all persons living on state territory, in particular, through education.[117] The idea of "intercultural dialogue" also underlies article 12.[118] This article obliges states parties to take measures in the field of education to foster knowledge of the culture of their national minorities as well as of the majority.[119] The general obligation is then linked with practical issues in this context. States parties must *inter alia* provide opportunities for teacher training and access to textbooks and facilitate

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[114] The supervision of the Convention is entrusted to a Consultative Committee (art. 33(1)), a body composed of representatives of states parties (art. 33(2)). The Committee examines proposals by states parties with a view to facilitating or improving the application of the Convention (art. 33(3)). It further adopts opinions and recommendations (art. 33(4)). Proposals, opinions and recommendations are addressed to the Committee of Ministers which decides on the action to be taken (art. 33(5)). The Committee must draw up a periodical report regarding the laws and regulations in force in states parties in respect of matters provided for in the Convention (art. 33(7)).

[115] Framework Convention for the Protection of National Minorities (1995) ETS No. 157, entered into force on 2 January 1998. On the rights protected by the Convention in the educational sphere, see Thornberry and Gibbons, 1996–1997, pp. 132–138 and Hodgson, 1998, p. 112.

[116] The Convention itself does not define the term "national minorities". Recommendations 1201 (1993) and 1255 (1995) of the Parliamentary Assembly suggest that it refers to persons who are nationals of the state party concerned. Thus, migrant workers are, for example, excluded. The Assembly's narrow interpretation is rather unfortunate.

[117] Art. 6(1) states, "The Parties shall encourage a spirit of tolerance and intercultural dialogue and take effective measures to promote mutual respect and understanding and co-operation among all persons living on their territory, irrespective of those persons' ethnic, cultural, linguistic or religious identity, in particular in the fields of education, culture and the media".

[118] Art. 12 states, "1. The Parties shall, where appropriate, take measures in the fields of education and research to foster knowledge of the culture, history, language and religion of their national minorities and of the majority. 2. In this context the Parties shall *inter alia* provide adequate opportunities for teacher training and access to textbooks, and facilitate contacts among students and teachers of different communities. 3. The Parties undertake to promote equal opportunities for access to education at all levels for persons belonging to national minorities".

[119] Compare art. 4(4) Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, discussed at 4.11.2. *supra*. The comments made there apply here as well.

contacts among students and teachers of different communities. The article continues by adding a right of equal access to education at all levels for persons belonging to national minorities.

Article 13 concerns the right of persons belonging to national minorities to establish their own private educational institutions. The provision states:

> 1. Within the framework of their education systems, the Parties shall recognise that persons belonging to a national minority have the right to set up and to manage their own private educational and training establishments.
> 2. The exercise of this right shall not entail any financial obligation for the Parties.

The reference to "[w]ithin the framework of their education systems" indicates that states parties may lay down minimum standards to which the education given in minority educational institutions must conform. It is unfortunate that the provision expressly absolves states parties from assuming positive obligations of support with regard to minority schools. In many instances, the right of persons belonging to minorities to establish and maintain their own schools will remain a theoretical concept if the state does not provide assistance, financial or otherwise. More often than not, minorities lack the means necessary to do so all by themselves.[120]

Article 14, finally, formulates certain language rights in education for persons belonging to national minorities. The provision stipulates:

> 1. The Parties undertake to recognise that every person belonging to a national minority has the right to learn his or her minority language.
> 2. In areas inhabited by persons belonging to national minorities traditionally or in substantial numbers, if there is sufficient demand, the Parties shall endeavour to ensure, as far as possible and within the framework of their education systems, that persons belonging to those minorities have adequate opportunities for being taught the minority language or for receiving instruction in this language.
> 3. Paragraph 2 of this article shall be implemented without prejudice to the learning of the official language or the teaching in this language.

Like article 4(3) of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, article 14(2) refers to the study *of* and instruction *in* the mother tongue as alternatives. As has been stated above, the study *of and* instruction *in* the mother tongue—both, at least, up to the secondary school level—are essential, if children belonging to minorities are to acquire fluency in their mother tongue and if minority culture is to be effectively protected. Like article 4(3) of the

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[120] Compare art. 2(4) Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, discussed at 4.11.2. *supra.*

Declaration, the provision, therefore, lags behind the standard which must be guaranteed to effectively protect minority rights.[121] A reading of article 14(2) in accordance with the *Explanatory Report to the Convention* weakens the provision even further. "Sufficient demand" is said to represent "a flexible form of wording which allows Parties to take account of their countries' own particular circumstances".[122] Likewise, "as far as possible", "indicates that such instruction is dependent on the available resources of the Party concerned".[123] Such a reading concedes a great deal to governments. If the provision is not to be devoid of any protective meaning, "[i]t [must not be] open to the State to set artificially high levels before a 'demand' is recognised".[124] Neither may the state too easily be held to have discharged the onus of showing that it has insufficient resources at its disposal to ensure the opportunities to which article 14(2) refers.[125]

2.1.5. *The European Charter for Regional or Minority Languages*

In 1992, the Council of Europe adopted the *European Charter for Regional or Minority Languages*.[126] The preamble of the Charter proclaims that "the right to use a regional or minority language in private and public life is an inalienable right". However, it also stresses the value of interculturalism and multilingualism, and emphasises that "the protection and encouragement of regional or minority languages should not be to the detriment of the official languages and the need to learn them". This removes any misapprehension as to the aims of the Charter. It does not seek to foster any kind of partitioning off of linguistic groups.[127] Article 1 of the Charter defines "regional or minority languages" to mean languages that are traditionally used within a given territory of a state by nationals of that state

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[121] Compare art. 4(3) Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, discussed at 4.11.2. *supra*.

[122] *Explanatory Report to the Convention*, para. 76.

[123] *Ibidem* at para. 75.

[124] Thornberry and Gibbons, 1996–1997, p. 136.

[125] The supervision of the Convention is entrusted to the Committee of Ministers (art. 24), assisted by an Advisory Committee, a body composed of independent experts (art. 26 read with Committee of Ministers Resolution (97) 10 of 17 September 1997, paras. 5 and 6). Art. 25 instructs states parties to submit reports on the application of the Convention. The Advisory Committee considers the reports and transmits its opinions to the Committee of Ministers (Resolution (97) 10, para. 23). Following receipt of the opinion of the Advisory Committee, the Committee of Ministers adopts its conclusions concerning the adequacy of the measures taken by the state party concerned and it may also adopt recommendations in respect of that state party (Resolution (97) 10, para. 24).

[126] European Charter for Regional or Minority Languages (1992) ETS No. 148, entered into force on 3 January 1998. On the rights protected by the Charter in the educational sphere, see Thornberry and Gibbons, 1996–1997, pp. 132–138 and Hodgson, 1998, p. 111.

[127] *Explanatory Report to the Charter*, para. 29.

who form a group numerically smaller than the rest of the state's population, and different from the official language(s) of that state, excluding, however, dialects of the official language(s) of the state and the languages of migrants.[128]

Article 7(3) of the Charter engages states parties to promote the inclusion of respect, understanding and tolerance in relation to regional or minority languages among the objectives of education.[129] In terms of article 8(g), states parties may undertake "to make arrangements to ensure the teaching of the history and the culture which is reflected by the regional or minority language".

A commendable provision of the Charter is article 7(4). It provides that

> [i]n determining their policy with regard to regional or minority languages, the Parties shall take into consideration the needs and wishes expressed by the groups which use such languages. They are encouraged to establish bodies, if necessary, for the purpose of advising the authorities on all matters pertaining to regional or minority languages.

The effective protection of minority rights presupposes that minorities have a consultative, advisory or analogous role in the formulation of policy on minority issues.[130] Article 7(4) recognises this fact in relation to policy with regard to minority languages. Naturally, article 7(4) also applies in as far as policy with regard to minority languages *in education* is concerned.

Article 8 addresses the topic of regional or minority languages in education.[131] The article manifests an elaborate structure. It applies to pre-school

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[128] It is deplorable that only regional or minority languages used by *nationals* of a state party are covered by the Charter. See also note 116 *supra*.

[129] Art. 7(3) states, "The Parties undertake to promote, by appropriate measures, mutual understanding between all the linguistic groups of the country and in particular the inclusion of respect, understanding and tolerance in relation to regional or minority languages among the objectives of education and training provided within their countries and encouragement of the mass media to pursue the same objective".

[130] See Thornberry and Gibbons, 1996–1997, pp. 133–134.

[131] Art. 8 states, "1. With regard to education, the Parties undertake, within the territory in which such languages are used, according to the situation of each of these languages, and without prejudice to the teaching of the official language(s) of the State: (a) (i) to make available *pre-school education* in the relevant regional or minority languages; or (ii) to make available a substantial part of pre-school education in the relevant regional or minority languages; or (iii) to apply one of the measures provided for under (i) and (ii) above at least to those pupils whose families so request and whose number is considered sufficient; or (iv) if the authorities have no direct competence in the field of pre-school education, to favour and/or encourage the application of the measures referred to under (i) to (iii) above; (b) (i) to make available *primary education* in the relevant regional or minority languages; or (ii) to make available a substantial part of primary education in the relevant regional or minority languages; or (iii) to provide, within primary education, for the teaching of the relevant regional or minority languages as an integral part of the curriculum; or (iv) to apply one of the measures provided for under (i) to (iii) above at least to those pupils whose families so request and whose number is considered sufficient; (c) (i) to make

education, primary education, secondary education, vocational and technical education, university and other higher education, and adult and continuing education. Each of paragraphs (a) to (f) provides for a similar "sliding-scale of possibilities" for the use of regional or minority languages at a certain level of education. Article 8(b) on primary education, for example, provides that states parties undertake

> (b) (i) to make available primary education in the relevant regional or minority languages; or
> (ii) to make available a substantial part of primary education in the relevant regional or minority languages; or
> (iii) to provide, within primary education, for the teaching of the relevant regional or minority languages as an integral part of the curriculum; or
> (iv) to apply one of the measures provided for under (i) to (iii) above at least to those pupils whose families so request and whose number is considered sufficient.

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available *secondary education* in the relevant regional or minority languages; or (ii) to make available a substantial part of secondary education in the relevant regional or minority languages; or (iii) to provide, within secondary education, for the teaching of the relevant regional or minority languages as an integral part of the curriculum; or (iv) to apply one of the measures provided for under (i) to (iii) above at least to those pupils who, or where appropriate whose families, so wish in a number considered sufficient; (d) (i) to make available *technical and vocational education* in the relevant regional or minority languages; or (ii) to make available a substantial part of technical and vocational education in the relevant regional or minority languages; or (iii) to provide, within technical and vocational education, for the teaching of the relevant regional or minority languages as an integral part of the curriculum; or (iv) to apply one of the measures provided for under (i) to (iii) above at least to those pupils who, or where appropriate whose families, so wish in a number considered sufficient; (e) (i) to make available *university and other higher education* in regional or minority languages; or (ii) to provide facilities for the study of these languages as university and higher education subjects; or (iii) if, by reason of the role of the State in relation to higher education institutions, subparagraphs (i) and (ii) cannot be applied, to encourage and/or allow the provision of university or other forms of higher education in regional or minority languages or of facilities for the study of these languages as university or higher education subjects; (f) (i) to arrange for the provision of *adult and continuing courses* which are taught mainly or wholly in the regional or minority languages; or (ii) to offer such languages as subjects of adult and continuing education; or (iii) if the public authorities have no direct competence in the field of adult education, to favour and/or encourage the offering of such languages as subjects of adult and continuing education; (g) to make arrangements to ensure the teaching of the history and the culture which is reflected by the regional or minority language; (h) to provide the basic and further training of the teachers required to implement those of paragraphs (a) to (g) accepted by the Party; (i) to set up a supervisory body or bodies responsible for monitoring the measures taken and progress achieved in establishing or developing the teaching of regional or minority languages and for drawing up periodic reports of their findings, which will be made public. 2. With regard to education and in respect of territories other than those in which the regional or minority languages are traditionally used, the Parties undertake, if the number of users of a regional or minority language justifies it, to allow, encourage or provide teaching in or of the regional or minority language at all the appropriate stages of education" [author's emphases].

Article 8 must be read together with articles 2 and 3 of the Charter. Article 3(1) requires every state party to specify each regional or minority language with regard to which it applies paragraphs or subparagraphs chosen in accordance with article 2(2). Article 2(2) requires every state party to apply *inter alia* at least three paragraphs or subparagraphs chosen from article 8 in respect of each language specified.[132] States parties may not make a wild choice from among the paragraphs and subparagraphs of article 8. Article 8(1) supports this statement where it requires a choice to be made "according to the situation of each of [the] languages". Factors which must guide the determination are the number of speakers of a language, the demand for teaching in/of the language and the appropriateness (in view of the intrinsic characteristics of a language) of teaching in/of the language at each particular level.[133] Whether or not the Charter adds to the protection of minority language rights depends on whether states parties choose from among the provisions of the Charter in a responsible manner.[134]

2.2. *Instruments of the European Union*[135]

The basis of the European Union (EU) lies in furthering the economic and—in the longer term—the political integration of the twenty-five member states, it comprises of since 1 May 2004.[136] The EU consists of two communities, the European Community[137] (previously called the European

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[132] Altogether at least thirty-five paragraphs or subparagraphs must be chosen from arts. 8–14, constituting Part III of the Charter (art. 2(2)).

[133] Para. 63 of the *Explanatory Report to the Charter* states, "The arrangements for the teaching of the regional or minority language will obviously vary according to the level of education concerned. In particular, in some cases, provision will need to be made for teaching 'in' the regional or minority language and in others only for teaching 'of' the language. Only the teaching of the regional or minority language at levels for which the language would not be appropriate, in view of its own particular characteristics, could be left out of account".

[134] The supervision of the Charter is entrusted to a Committee of Experts, a body composed of independent experts (art. 17). Art. 15 instructs states parties to submit reports on the application of the Charter. The reports are examined by the Committee (art. 16(1)). The Committee must prepare a report for the Committee of Ministers, containing in particular proposals for such recommendations of the Committee of Ministers to one or more of the states parties as may be required (art. 16(3) and (4)). The Committee of Ministers may then decide to make recommendations to states parties with a view to their taking the necessary action to comply with their obligations under the Charter. Once every two years, the Secretary-General of the Council of Europe must present a report to the Parliamentary Assembly on the application of the Charter (art. 16(5)).

[135] The texts of instruments of the European Union are available on the website of the Union (http://europa.eu.int).

[136] The EU was founded by the *Treaty on European Union* (also called the Maastricht Treaty) of 1992, which entered into force on 1 November 1993.

[137] *Treaty Establishing the European Economic Community* (now *Treaty Establishing the European Community*) of 1957, entered into force on 1 January 1958, as amended.

Economic Community) and the European Atomic Energy Community[138]—a further community, the European Coal and Steel Community,[139] having been dissolved mid-2002—and two processes, entitled "Common Foreign and Security Policy" and "Police and Judicial Co-operation in Criminal Matters", respectively.[140] The latter are processes of intergovernmental co-operation between member states. Each of the former assumes the form of a supranational organisation. Supranationality follows from the fact that the communities may adopt legislation which immediately forms part of national law. The institutions of the EU comprise primarily the European Parliament, the Council, the Commission and the Court of Justice. In the context of the European Community, the Commission originates legislative proposals which are then sent to the Council and the Parliament. Both organs play a role in the adoption of legislation in the form of regulations and directives.[141]

On 29 October 2004 at a meeting at Rome, Italy, the Heads of State and Government of the European Union signed the *Treaty Establishing a Constitution for Europe*. The Treaty envisages the creation of the European Union as a single entity with legal personality, endowed with (*inter alia*) the competences presently linked to the various pillars of the EU. The newly constituted EU will "retain" the institutions mentioned above. As the Treaty will enter into force at the earliest on 1 November 2006, the following discussion will deal with the current state of the law. Where appropriate, however, the provisions of the Treaty will be referred to.[142]

The discussion of educational issues in the context of the European Union which follows will be structured in this way: First of all, a number of non-binding instruments of the European Parliament protecting the right to education will be mentioned. Thereafter, the various provisions on educational issues contained in the Treaty Establishing the European Community and in legislation of the European Community, based on the Treaty, will be referred to. It will then be shown which educational rights the European Court of Justice has deduced from the latter (or preceding) and

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[138] *Treaty Establishing the European Atomic Energy Community* of 1957, entered into force on 1 January 1958, as amended.

[139] *Treaty Establishing the European Coal and Steel Community* of 1951, as amended. It entered into force on 23 July 1952 and was dissolved on 23 July 2002.

[140] The two processes have been established by the Treaty on European Union.

[141] Whereas a *regulation* has general application, and is binding in its entirety and directly applicable in all member states, a *directive* is binding, as to the result to be achieved, upon each member state to which it is addressed, but leaves to the national authorities the choice of form and methods. See art. 249 Treaty Establishing the European Community. Under the new EU Constitution (see the discussion *infra*), regulations will be termed European laws and directives European framework laws.

[142] For the text of the Treaty Establishing a Constitution for Europe, see *Official Journal* C 310 of 16 December 2004.

other provisions. It will, finally, be examined whether, in the light of the primary and secondary Community law and the jurisprudence of the Court, an EU right to education may be held to exist, and, if so, how this relates to the right to education as protected in article 14 of the Charter of Fundamental Rights of the European Union of 2000.[143]

The right to education is recognised in two (non-binding) resolutions of the European Parliament.

In 1984, the Parliament adopted the *Resolution on Freedom of Education in the European Community*.[144] Whereas Part I of the Resolution calls for the recognition of certain principles, Part II calls for specific action to implement these principles. A few of the Principles in Part I should be mentioned. Principle 1 recognises the child's right to education and the right of parents to decide on the type of education to be given to their children. Principle 2 states that the right to education is to be enjoyed without discrimination of any kind. Principle 5 declares that the purpose of education must be to enable the individual to develop fully. Principle 7 recognises the right to establish and direct private schools and the right of parents to select a school in which their children will receive the instruction they desire.

In 1989, the European Parliament adopted the *Declaration of Fundamental Rights and Freedoms*.[145] Article 16 of the Declaration protects the right to education. It states:

1. Everyone shall have the right to education and vocational training appropriate to their abilities.
2. There shall be freedom in education.
3. Parents shall have the right to make provision for such education in accordance with their religious and philosophical convictions.

Reference should also be made to the Parliament's (non-binding) *Resolution on the languages and cultures of regional and ethnic minorities in the European Community* (also called the Kuijpers Resolution) of 1987.[146] Paragraph 5 of the Resolution recommends to member states, amongst others, that they should "[arrange] for pre-school to university education and continuing education to be officially conducted in the regional and minority languages in the language areas concerned on an equal footing with instruction in the national languages" and, further, that they should "officially [recognise] courses, classes and schools set up by associations which are authorised to teach, under

[143] For a thorough discussion of educational issues in the context of the EU, see Gori, 2001.
[144] Resolution of 14 March 1984.
[145] Resolution of 12 April 1989.
[146] Resolution of 30 October 1987.

the regulations in force in the country concerned, and which use a regional or minority language as the general teaching language".

Articles 149 and 150 of the *Treaty Establishing the European Community* of 1957, as amended, confer certain competences on the European Community in the fields of education and vocational training, respectively. Articles 149 and 150 were introduced by the *Treaty on European Union* of 1992.[147] Whereas article 149 creates an obligation for the Community to contribute to the development of quality education,[148] article 150 establishes its obligation to implement a vocational training policy.[149] Note should, however, be taken of the limited nature of the Community's competence. Its competence is *complementary* to that of member states. As is clearly stipulated in

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[147] Arts. 149 and 150 were arts. 126 and 127 prior to the *Treaty of Amsterdam* of 1997, which amended the numbering of provisions of the Treaty Establishing the European Community. Prior to the Treaty on European Union, art. 128 of the Treaty Establishing the European Economic Community had provided for a limited competence of the European Economic Community in the field of vocational training. Art. 128 had stated that "[t]he Council shall . . . establish general principles for the implementation of a common policy of occupational training capable of contributing to the harmonious development both of national economies and of the Common Market". Those general principles were laid down for the first time in Council Decision No. 63/266 of 2 April 1963.

[148] Art. 149 states, "1. The Community shall contribute to the development of quality education by encouraging co-operation between Member States and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity. 2. Community action shall be aimed at: developing the European dimension in education, particularly through the teaching and dissemination of the languages of the Member States; encouraging mobility of students and teachers, *inter alia* by encouraging the academic recognition of diplomas and periods of study; promoting co-operation between educational establishments; developing exchanges of information and experience on issues common to the education systems of the Member States; encouraging the development of youth exchanges and of exchanges of socio-educational instructors; encouraging the development of distance education. 3. The Community and the Member States shall foster co-operation with third countries and the competent international organisations in the field of education, in particular the Council of Europe. 4. In order to contribute to the achievement of the objectives referred to in this Article, the Council: acting in accordance with the procedure referred to in Article 251, after consulting the Economic and Social Committee and the Committee of the Regions, shall adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States; acting by a qualified majority on a proposal from the Commission, shall adopt recommendations". The provision in the *Treaty Establishing a Constitution for Europe* of 2004 which corresponds to art. 149 is art. III-282. The content of art. III-282 largely coincides with art. 149. See, however, note 150 *infra*. The objectives of art. 149 have been implemented by the *Socrates* programme. See Decisions Nos. 819/95/EC of 14 March 1995 and 253/2000/EC of 24 January 2000 of the European Parliament and of the Council. On the *Socrates* programme, see Gori, 2001, chapter 4.

[149] Art. 150 states, "1. The Community shall implement a vocational training policy which shall support and supplement the action of the Member States, while fully respecting the responsibility of the Member States for the content and organisation of vocational training. 2. Community action shall aim to: facilitate adaptation to industrial changes, in particular through vocational training and retraining; improve initial and continuing vocational training in order to facilitate vocational integration and reintegration into the labour

articles 149(1) and 150(1), the Community must encourage co-operation between member states and support and supplement the action of member states. Furthermore, the competence of the Community is subject to *the principle of subsidiarity*. Articles 149(1) and 150(1) state that Community action must fully respect the responsibility of member states for the content of teaching and the organisation of education systems and their cultural and linguistic diversity/their responsibility for the content and organisation of vocational training. Moreover, Community competence is limited by *the prohibition of harmonisation*. In terms of articles 149(4) and 150(4), Community action cannot go as far as to harmonise aspects of member states' education/vocational training systems.[150] There is today a drift towards intergovernmental co-operation among member states within the framework of the Community in the fields of education and vocational training, directed against ambitions the Community may have in the stated fields. This is reflected in the fact that instruments in these fields take the form of soft-law documents, such as recommendations, resolutions or conclusions, rather than binding decisions.[151]

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market; facilitate access to vocational training and encourage mobility of instructors and trainees and particularly young people; stimulate co-operation on training between educational or training establishments and firms; develop exchanges of information and experience on issues common to the training systems of the Member States. 3. The Community and the Member States shall foster co-operation with third countries and the competent international organisations in the sphere of vocational training. 4. The Council, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee and the Committee of the Regions, shall adopt measures to contribute to the achievement of the objectives referred to in this Article, excluding any harmonisation of the laws and regulations of the Member States". The provision in the *Treaty Establishing a Constitution for Europe* of 2004 which corresponds to art. 150 is art. III-283. The content of art. III-283 largely coincides with art. 150. See, however, note 150 *infra*. The objectives of art. 150 have been implemented by the *Leonardo da Vinci* programme. See Council Decisions Nos. 94/819/EC of 6 December 1994 and 99/382/EC of 26 April 1999. On the *Leonardo da Vinci* programme, see Gori, 2001, chapter 4.

[150] On the extent of Community competence in the fields of education and vocational training, see Gori, 2001, pp. 85–89 and pp. 92–94. At pp. 89–92 and p. 95, Gori argues that incentive measures/measures under arts. 149(4) and 150(4), respectively, cannot be in the form of regulations or directives by reason of the prohibition of harmonisation. It should be noted, however, that arts. III-282(3) and III-283(3) of the *Treaty Establishing a Constitution for Europe* of 2004 provide for incentive measures/necessary measures, respectively, in the form of European laws and European framework laws. Concerning arts. III-282 and III-283 Constitution, see notes 148 and 149 *supra*, respectively. Despite the prohibition of harmonisation in the fields of education and vocational training, the Community recently adopted *Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin*. The Directive seeks to combat discrimination on the grounds of racial or ethnic origin and it applies to all persons, as regards both the public and private sectors in relation to various specified fields, including education and vocational training.

[151] See Gori, 2001, pp. 134–154. In some cases, member states wish to take the decision-making arena back to the *pure* intergovernmental level. An example in this regard is the co-operation among member states in the field of higher education as part of the

The aim of the Community is to create a common market and an economic and monetary union.[152] To this end, the Community must secure, amongst others, freedom of movement for workers within the Community.[153]

On 15 October 1968, the Council adopted *Regulation No. 1612/68* in an effort to give content to the principle of freedom of movement for workers within the Community.[154] Relevant in the present context are articles 7(2) and (3) and 12 of the Regulation. Article 7(2) and (3), concerning workers themselves, state:

> 2. [A worker who is a national of a Member State] shall enjoy the same social and tax advantages as national workers.
> 3. He shall also, . . . under the same conditions as national workers, have access to training in vocational schools and retraining centres.

Article 12, concerning the children of workers, states:

> The children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that State's general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory.
>
> Member States shall encourage all efforts to enable such children to attend these courses under the best possible conditions.

To improve the conditions of freedom of movement for workers, the Council on 25 July 1977 adopted *Directive 77/486* on the education of the children of migrant workers.[155] The Directive defines the children to whom it applies as "children for whom school attendance is compulsory under the laws of the host State, who are dependents of any worker who is a national of another Member State, where such children are resident in the territory of the Member State in which that national carries on or has carried on an activity as an employed person".[156] Article 2 of the Directive provides:

> Member States shall, in accordance with their national circumstances and legal systems, take appropriate measures to ensure that free tuition to facilitate initial reception is offered in their territory to [the children of migrant

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Bologna process, based on the *Declaration on the European higher education area*, signed at Bologna, Italy on 19 June 1999. See Gori, 2001, pp. 150–153.

[152] Art. 2 Treaty Establishing the European Community, as amended.

[153] Art. 39 Treaty Establishing the European Community, as amended.

[154] *Regulation (EEC) No. 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community*.

[155] *Council Directive 77/486/EEC of 25 July 1977 on the education of the children of migrant workers*.

[156] Art. 1 Directive.

> workers], including, in particular, the teaching—adapted to the specific needs of such children—of the official language or one of the official languages of the host State.
>
> Member States shall take the measures necessary for the training and further training of the teachers who are to provide this tuition.

Article 3 of the Directive provides:

> Member States shall, in accordance with their national circumstances and legal systems, and in co-operation with States of origin, take appropriate measures to promote, in co-ordination with normal education, teaching of the mother tongue and culture of the country of origin for [the children of migrant workers].

Thus, whereas article 2 obliges member states to take appropriate measures to ensure free tuition at the compulsory level to the children of migrant workers—and this must include the teaching of the official language of the host state—article 3 requires them to take appropriate measures to promote the teaching of the mother tongue to the children concerned. So far, Directive 77/486 has not been implemented rigorously.

The European Court of Justice has, on the basis of the provisions on educational issues and various other provisions contained in primary and secondary Community law, deduced a range of educational rights, granting entitlements to individuals in the Community context. The following rights have thus been articulated by the Court:[157]

- A Community national who stops working and then undertakes studies in the host member state must still be considered a worker, provided there is a link between the previous occupational activity and the studies in question. In consequence, he retains his right of access to training on the same conditions as national workers, under article 7(3) Regulation No. 1612/68.[158]
- A worker, as contemplated in Regulation No. 1612/68, not only has a right of equal access to *vocational training* (under article 7(3) Regulation), but also a right of equal access to *university education*. This follows from article 7(2) Regulation, which provides that workers are entitled to, amongst others, the same social advantages as national workers.[159]

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[157] For a discussion of the meaning and scope of educational rights in the Community context, see Gori, 2001, chapter 7.

[158] See Case 39/86, *Sylvie Lair v. Universität Hannover*, Judgement of 21 June 1988, ECR 1988 p. 3161.

[159] See *idem* and Case 197/86, *Steven Malcolm Brown v. Secretary of State for Scotland*, Judgement of 21 June 1988, ECR 1988 p. 3205.

- The notion of "social advantages" contained in article 7(2) Regulation No. 1612/68 covers not only study fees, but also social benefits, such as maintenance and training grants.[160]
- The child of a worker of a member state who has been in employment in another member state retains the status of member of a worker's family within the meaning of Regulation No. 1612/68 when that child's family returns to the member state of origin and the child remains in the host state in order to continue his studies there. In consequence, such a child stays entitled to enjoy the right of admission to education under the same conditions as the nationals of the host state, under article 12 Regulation No. 1612/68.[161]
- Article 12 Regulation No. 1612/68 applies not only to rules relating to admission, but also to general measures intended to facilitate educational attendance. This means that the children of workers are entitled to equal treatment also with regard to social benefits, such as educational grants.[162]
- The definition of children in articles 10 and 11 Regulation No. 1612/68, in terms of which the children of a worker are those who are under 21 years of age or dependent, does not apply to article 12 Regulation. Hence, article 12 also covers financial assistance for those children who are already at an advanced stage in their education, even if they are already 21 years of age and no longer dependent on their parents.[163]
- Community nationals are accorded a right of access to vocational training in other member states on equal terms with the nationals of the respective member states.[164] The right of equal access also applies to artistic higher education[165] and university higher education.[166] The right has been held to follow from the fact that access to education and vocational training falls within the scope of Community competence in these fields under the Treaty Establishing the European Community, and an

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[160] See the *Lair* case, see note 158 *supra*.

[161] See Joined Cases 389/87 and 390/87, *G.B.C. Echternach and A. Moritz v. Minister van Onderwijs en Wetenschappen*, Judgement of 15 March 1989, ECR 1989 p. 723.

[162] See Case 9/74, *Donato Casagrande v. Landeshauptstadt München*, Judgement of 3 July 1974, ECR 1974 p. 773.

[163] See Case C-7/94, *Landesamt für Ausbildungsförderung Nordrhein-Westfalen v. Lubor Gaal*, Judgement of 4 May 1995, ECR 1995 p. I–1031.

[164] This right was first recognised with regard to the obligation to pay registration fees in Case 152/82, *Sandro Forcheri and his wife Marisa Forcheri, née Marino v. Belgian State and asbl Institut Supérieur de Sciences Humaines Appliquées—Ecole Ouvrière Supérieure*, Judgement of 13 July 1983, ECR 1983 p. 2323 and Case 293/83, *Françoise Gravier v. City of Liège*, Judgement of 13 February 1985, ECR 1985 p. 593.

[165] See the *Gravier* case, see note 164 *supra*.

[166] This was held in Case 24/86, *Vincent Blaizot v. University of Liège and others*, Judgement of 2 February 1988, ECR 1988 p. 379 with regard to the obligation to pay registration fees.

application of the principle of non-discrimination on the ground of nationality, now laid down in article 12 of the Treaty.[167] The right of equal access to education and vocational training entails that Community nationals may not be refused admission to educational establishments, that they may not be included in foreign student quotas,[168] and that they may not be required to pay higher registration fees.[169] Furthermore, community nationals (also where they are students), who legally reside in a host member state, are entitled to a minimum subsistence allowance on the same conditions as nationals of the host state.[170] Students, who are community nationals and who legally reside in a host member state, are, moreover, entitled to assistance (subsidised loans or grants) to cover maintenance costs on the same conditions as nationals of the host state, as such assistance falls within the scope of application of the Treaty for the purposes of article 12 on non-discrimination.[171]

- Community nationals also have a right of access to private education in other member states. This right applies with regard to private education offered against payment. Such education constitutes a "service" under

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[167] See the *Forcheri* and *Gravier* cases, see note 164 *supra*. In both these cases, the Court concluded on the basis of an extensive interpretation of art. 128 of the Treaty Establishing the European Economic Community in the light of Council Decision No. 63/266 of 2 April 1963, see note 147 *supra*, that access to vocational training fell within the scope of the Treaty. In *Gravier*, at para. 24, the Court further supported its conclusion by stating, "Access to vocational training is in particular likely to promote free movement of persons throughout the Community, by enabling them to obtain a qualification in the member state where they intend to work and by enabling them to complete their training and develop their particular talents in the member state whose vocational training programmes include the special subject desired".

[168] See Case 293/85, *Commission of the European Communities v. Kingdom of Belgium*, Judgement of 2 February 1988, ECR 1988 p. 305.

[169] See the *Forcheri* and *Gravier* cases, see note 164 *supra*, and the *Blaizot* case, see note 166 *supra*. The right of equal access to education and vocational training is linked to a right of residence, granted in terms of *Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students*. The right of residence is granted on the condition that students are enrolled at an approved educational establishment, that they are covered by adequate health insurance, and that they have sufficient resources to avoid becoming a burden on the social security system of the host member state.

[170] See Case C-184/99, *Rudy Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, Judgement of 20 September 2001, ECR 2001 p. I–6193. In arriving at its conclusion, the Court relied on what are now art. 12 on non-discrimination and art. 17 on Union citizenship of the Treaty Establishing the European Community.

[171] See Case C-209/03, *The Queen (on the application of Dany Bidar) v. London Borough of Ealing & Secretary of State for Education and Skills*, Judgement of 15 March 2005, available on the website of the European Union at http://europa.eu.int. It is, however, legitimate for the host member state to grant such assistance only to students who have demonstrated a certain degree of integration into the society of that state. The Court concluded on the basis of an interpretation of art. 17 on Union citizenship and art. 149 on Community competence in the field of education of the Treaty Establishing the European Community, as amended, that maintenance assistance for students fell within the scope of the Treaty.

the Treaty Establishing the European Community,[172] and is thus covered by the freedom to provide services within the Community,[173] which includes the freedom of recipients of services, including students, to go to another member state in order to receive a service there.[174] It follows from the principle of non-discrimination on the ground of nationality in article 12 of the Treaty that the right of access to private education may be exercised on equal terms with the nationals of the respective member states.

- By virtue of the freedom of establishment of nationals of a member state in the territory of another member state,[175] Community nationals have a right to set up private schools in other member states.[176] It follows from the principle of non-discrimination that the right may be exercised on equal terms with the nationals of the respective member states.
- The freedom of establishment implies that, where a Community national wishes to pursue a specific activity in another member state where this is subject to the duty to hold particular diplomas, that national has a right that the member state "take account of the equivalence of diplomas and, if necessary, proceed to a comparison of the knowledge and qualifications required by [its] national rules and those of the person concerned".[177]

It should be agreed with Gisella Gori who, in the light of the primary and secondary Community law and the jurisprudence of the European Court of Justice, considers that there exists an EU right to education.[178] This right to education may—in general terms—be stated to have the following content: It encompasses the right of equal access to education at all levels, the right of parents to choose for their children private schools, and the right of persons to establish and direct private schools. The stated right does not entail a claim on a member state to set up an education system in the first place. This follows from the limited nature of Community competence under articles 149 and 150 Treaty Establishing the European

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[172] Art. 50 Treaty Establishing the European Community, as amended.

[173] Art. 49 Treaty Establishing the European Community, as amended.

[174] See Joined Cases 286/82 and 26/83, *Graziana Luisi and Giuseppe Carbone v. Ministero del Tesoro*, Judgement of 31 January 1984, ECR 1984 p. 377.

[175] Art. 43 Treaty Establishing the European Community, as amended.

[176] See Case 147/86, *Commission of the European Communities v. Hellenic Republic*, Judgement of 15 March 1988, ECR 1988 p. 1637.

[177] See Case C-55/94, *Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, Judgement of 30 November 1995, ECR 1995 p. I–4165. A number of directives regulate the matter of the professional recognition of qualifications. These are: *Council Directive 89/48/EEC of 21 December 1988*, *Council Directive 92/51/EEC of 18 June 1992*, and *Directive 99/42/EC of the European Parliament and of the Council of 7 June 1999*.

[178] See Gori, 2001, chapter 12.

Community, in terms of which Community action must respect the responsibility of member states to organise their education systems.[179] The EU right to education differs in important respects from the right to education protected in article 2 First Protocol ECHR. Firstly, unlike the latter, the former does not protect the right of parents to ensure the education of their children in conformity with their own religious and philosophical convictions. Secondly, article 2 P-1 ECHR obliges states parties in respect of all persons—nationals and foreigners—under their jurisdiction.[180] The EU right to education obliges member states solely in respect of foreigners who are nationals of member states.[181] Thirdly, article 2 P-1 ECHR does not give foreigners a right to claim admittance to a state party so as to receive education there.[182] By way of contrast, the EU right to education allows transnational mobility for study purposes. This follows from Community law itself.[183] Fourthly, whereas the European Court of Human Rights protects article 2 P-1 ECHR with regard to the action of states parties—this may include state action implementing Community law[184]—the European Court of Justice protects the EU right to education with regard to the action of Community institutions and that of member states when acting within the scope of Community law.[185] Fifthly, regarding article 2 P-1 ECHR, individuals have a direct right of appeal to the European Court of Human Rights where they allege that a state party has violated the right to education.[186] In the EU context, the European Court of Justice, when deciding cases before it, will give due consideration to those human

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[179] See *ibidem* at pp. 384–385.

[180] Art. 1 ECHR.

[181] See Gori, 2001, pp. 388–389.

[182] The rights contained in the ECHR accrue to a person only once the latter is under the jurisdiction of a state party. Whether this is the situation is for that state party to decide on the basis of its national rules. In the case of Commission, Application No. 7671/76 and 14 other complaints, *15 Foreign Students v. United Kingdom*, DR 9 (1978), p. 185, the former European Commission of Human Rights denied that art. 2 P-1 ECHR granted individuals a right to challenge the refusal of an extension of their residence permits applied for in respect of studies to be followed.

[183] See Gori, 2001, pp. 369–371 and pp. 388–389.

[184] See *Matthews v. United Kingdom*, European Court of Human Rights (Grand Chamber), Judgement of 18 February 1999, Reports of Judgements and Decisions 1999–I, paras. 26–35.

[185] With regard to the relationship between the European jurisdictions in the sphere of the protection of human rights, the following may be noted: As far as the action of *Community member states* is concerned, the European Court of Human Rights has stated that it will refrain from controlling the respect of human rights as long as effective protection is afforded by the European Court of Justice. See *Matthews v. United Kingdom*, see note 184 *supra*, para. 33. As far as the action of *the institutions of the Community* is concerned, this is not subject to the jurisdiction of the European Court of Human Rights, as the Community is not a party to the ECHR. In terms of art. I-9(2) of the *Treaty Establishing a Constitution for Europe* of 2004, however, the Union is obliged to accede to the ECHR.

[186] See 5.2.1.1. *supra*.

rights which form part of the general principles of Community law.[187] In the past, the Court protected the EU right to education indirectly by relying on the rights to free movement and equal protection.[188]

It may be asked how the EU right to education, as discussed above, relates to the right to education as protected in article 14 of the Charter of Fundamental Rights of the European Union. The *Charter of Fundamental Rights of the European Union* was proclaimed by the European Council at its Summit of Heads of State and Government of the European Union at Nice, France on 7 December 2000.[189] As yet, the Charter is non-binding. It will, however, become binding as Part II of the Treaty Establishing a Constitution for Europe, once this enters into force. Article 14 of the Charter (article II-74 of the Constitution) on the right to education states as follows:

1. Everyone has the right to education and to have access to vocational and continuing training.
2. This right includes the possibility to receive free compulsory education.
3. The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right.

Explanatory texts to the Charter state that article 14[190] is based on the common constitutional traditions of member states and on article 2 P-1 ECHR.[191] The *Explanatory texts* go on to stress, however, that it was considered useful to extend the right to education to cover vocational and continuing training[192] and to add the principle of free compulsory education. The

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[187] Under art. 6(2) Treaty on European Union, as amended, the Union must respect human rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the member states, as general principles of Community law.

[188] See Gori, 2001, p. 385 and pp. 393–398.

[189] For comments on the Charter, see Hohmann, H., "Die Charta der Grundrechte der Europäischen Union: Ein wichtiger Beitrag zur Legitimation der EU", in: *Aus Politik und Zeitgeschichte: Beilage zur Wochenzeitung "Das Parlament"*, No. 52–53, 22 December 2000, pp. 5–12 and also Schachtschneider, K., "Eine Charta der Grundrechte für die EU", in: *Aus Politik und Zeitgeschichte: Beilage zur Wochenzeitung "Das Parlament"*, No. 52–53, 22 December 2000, pp. 13–21.

[190] Generally on art. 14 Charter, see Gori, 2001, pp. 389–393 and pp. 399–400.

[191] See the comments on art. 14 Charter of the *Text of . . . explanations relating to the complete text of the Charter . . .*, Charte 4473/00, Convent 49, 11 October 2000, and of the *Updated explanations relating to the complete text of the Charter . . .*, Conv. 828/1/03 Rev. 1, 18 July 2003. In terms of art. II-112(7) of the *Treaty Establishing a Constitution for Europe* of 2004, the explanations drawn up as a way of providing guidance in the interpretation of the Charter must be given due regard by the courts of the Union and of the member states.

[192] In support of the extension, the *Explanatory texts* refer to point 15 of the *Community Charter of the Fundamental Social Rights of Workers* and art. 10 of the *European Social Charter*.

Explanatory texts emphasise that the latter principle does not mean that, with regard to compulsory education, all establishments which provide education, in particular private ones, must be free of charge. It merely implies that each child must have the possibility of attending an establishment which provides free education. Despite its positive formulation, article 14(1)—in the same way as the EU right to education, discussed above—grants an essentially negative right, *i.e.* a right of non-discriminatory access to educational institutions existing at a given time. This follows, firstly, from article 51(2) Charter (article II-111(2) Constitution), which states that the Charter does not establish any new power or task for the Community/Union, or modify existing powers and tasks. It has been shown above that the competences in the fields of education and vocational training are limited, and that they do not include the organisation of member states' education systems. Secondly, this follows from article 52(3) Charter (article II-112(3) Constitution), in terms of which the meaning and scope of rights of the Charter, which correspond to rights guaranteed by the ECHR, shall be the same as those laid down by that Convention. The *Explanatory texts*, commenting on article 52 Charter, note that article 14(1) Charter corresponds to article 2 P-1 ECHR. It has been demonstrated above that the right to education in the first sentence of article 2 P-1 ECHR is mainly negative in character.[193]

Like the EU right to education, discussed above, article 14(3) Charter recognises the freedom to found educational establishments. The *Explanatory texts to the Charter* emphasise that the freedom is limited by respect for democratic principles and must be exercised in accordance with the arrangements defined by national legislation.[194] Unlike the EU right to education, however, article 14(3) recognises the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions. The *Explanatory texts* stress that the right must be interpreted in conjunction with the provisions of article 24.[195] Article 24(1) states in part that children "may express their views freely" and that "[s]uch views shall be taken into consideration on matters which concern them in accordance with their age and maturity". Article 24(2) makes it clear that "[i]n all actions relating to children . . . the child's best interests must be a primary consideration". The *Explanatory texts*, commenting on article 52 Charter, note that article 14(3) Charter corresponds to article 2 P-1 ECHR as regards the rights of parents. According to article 52(3) Charter (article II-112(3) Constitution), this means that the mean-

[193] See 5.2.1.1.3. *supra.*
[194] See the comments on art. 14 Charter.
[195] See *idem.*

ing and scope of the right of parents under article 14(3) are the same as those of the right of parents under the second sentence of article 2 P-1 ECHR.

Article 51(1) Charter (article II-111(1) Constitution) obliges the institutions of the Union and member states, the latter only when they are acting within the scope of Union law, to respect the rights and to observe the principles of the Charter. The Charter will become judicially enforceable once the Treaty Establishing a Constitution for Europe enters into force. To the extent, however, that the Charter protects principles, these will not give rise to direct claims for positive action. They are judicially cognisable only where legislative or executive acts implementing such principles are being interpreted or reviewed.[196] Whereas article 14(1) and (3) Charter protect rights, article 14(2) Charter appears to protect a principle.[197]

It may be stated, in conclusion, that article 14 Charter in many ways codifies the unwritten EU right to education (without, however, abolishing the latter). It is apparent from the above discussion that article 14 Charter does not significantly add to the content of the unwritten EU right to education. The protection under article 14 of the right of parents concerning their children's education is new, however.[198]

2.3. *Instruments of the Conference/Organisation on Security and Co-operation in Europe*[199]

At a Summit of Heads of State and Government of all European states (except Albania), the United States of America and Canada, held at Helsinki, Finland, the *Final Act of Helsinki* was signed on 1 August 1975. The document concluded the first meeting of the Conference on Security and Co-operation in Europe (CSCE), which had opened at Helsinki on 3 July 1973. The Final Act of Helsinki contains commitments concerning security and co-operation in Europe. But, it also touches on human rights issues. Principle VII in Basket I refers to respect for human rights and fundamental freedoms and Basket III deals with "Co-operation in Humanitarian and Other Fields". Ever since, there have been four Follow-up Meetings and three Review Conferences,[200] the last one in 1999, where CSCE commitments

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[196] Art. II-112(5) of the *Treaty Establishing a Constitution for Europe* of 2004.

[197] See the comments on art. 14 Charter.

[198] Gori, 2001, p. 400 states that art. 14 Charter "does not improve the protection which is already afforded by the Court of Justice. This finally means that, as regards the fundamental right to education the Charter promises more than it can really protect".

[199] The texts of instruments of the Organisation for Security and Co-operation in Europe are available on the website of the Organisation (www.osce.org).

[200] The Helsinki Document of the CSCE of 1992 changed the name of the Follow-up Meetings to Review Conferences. Review Conferences are held every two years or so.

have been renewed and their implementation reviewed. Throughout the years, the CSCE process has become institutionalised and, since 1995, it is known as the Organisation on Security and Co-operation in Europe (OSCE). The OSCE provides for a series of negotiating and decision-making bodies, the most important such body being the Permanent Council, and several structures and institutions to follow up on decisions negotiated within the framework of the negotiating and decision-making bodies, including the Chairman-in-Office (the chief executive officer of the OSCE), a Secretariat, a Parliamentary Assembly, the Office for Democratic Institutions and Human Rights, the High Commissioner on National Minorities and a Court of Conciliation and Arbitration.

Provisions on education have been formulated in a number of documents produced by the CSCE/OSCE.[201] The Conference's/Organisation's documents do not, however, constitute international agreements, as defined in article 2(1) of the Vienna Convention on the Law of Treaties. Instead, they must be seen as political instruments[202] or as international soft-law documents.[203]

The *Final Act of Helsinki* of 1975 in Basket III on "Co-operation in Humanitarian and Other Fields" contains a section entitled "Co-operation and Exchanges in the Field of Education", in which participating states make various declarations of intent in the field of education.[204] The declarations speak of expanding and improving co-operation and links in the fields of education and science,[205] improving access for students, teachers and scholars to the educational, scientific and cultural institutions of participating states and intensifying exchanges among these institutions,[206] broadening and improving co-operation and exchanges in the field of science,[207] encouraging the study of foreign languages and civilisations,[208] and promoting the exchange of experience in teaching methods as well as the exchange of teaching materials.[209]

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[201] On educational issues in the context of the CSCE/OSCE, see Coomans, 1992, pp. 145–148 and Gebert, 1996, pp. 104–105.

[202] This is the view of Hacker, J., "Die allgemeinen Menschenrechte in den UN-Menschenrechts-Konventionen und in der KSZE-Schlußakte", in: Göttinger Arbeitskreis (ed.), *Die KSZE und die Menschenrechte*, Berlin, 1977, pp. 91–92 (Studien zur Deutschlandfrage; Vol. 2).

[203] This is the view of Tretter, H., "Die Menschenrechte im Abschließenden Dokument des Wiener KSZE-Folgetreffens vom 15. Januar 1989", in: *Europäische Grundrechte Zeitschrift*, 1989, pp. 79 *et seqq*.

[204] No. 4 of Basket III of the Final Act of Helsinki.

[205] No. 4(a) Basket III Final Act of Helsinki.

[206] No. 4(b) Basket III Final Act of Helsinki.

[207] No. 4(c) Basket III Final Act of Helsinki.

[208] No. 4(d) Basket III Final Act of Helsinki.

[209] No. 4(e) Basket III Final Act of Helsinki.

Issues of education were also addressed at the Follow-up Meetings held at Madrid, Spain from 11 November 1980 to 9 September 1983 and at Vienna, Austria from 4 November 1986 to 19 January 1989. The concluding documents of both meetings again contain sections entitled "Co-operation and Exchanges in the Field of Education". The relevant provisions of the *Concluding Document of the Vienna Follow-up Meeting of the CSCE* of 1989 are laid down in paragraphs 63 to 71. As in the Final Act of Helsinki, there are provisions on access to educational institutions and the exchange of persons and knowledge.[210] Paragraph 63 on non-discrimination is new, however. In terms thereof, participating states undertake to ensure access by all to education without discrimination. Likewise, the commitment to encourage the inclusion of the Final Act of Helsinki in the curricula of schools and universities is new.[211] The undertaking to ensure that persons belonging to national minorities can give and receive instruction on their own culture is also new.[212]

Under the title "Questions relating to Security in Europe", Principles 14 and 16 Vienna Concluding Document are relevant to the right to education. In terms of Principle 14, participating states recognise that the promotion of ESCR is of paramount importance for human dignity. They undertake to "continue their efforts with a view to achieving progressively the full realisation of economic, social and cultural rights by all appropriate means, including in particular by the adoption of legislative measures". In this context, one of the areas singled out for special attention by participating states is that of education. This constitutes an affirmation of the social aspect of the right to education and emphasises that the state has a duty to take positive measures aimed at creating educational opportunities at all levels of the education system. In terms of Principle 16, participating states undertake to ensure freedom of religion. Principle 16(6) obliges them to "respect the right of everyone to give and receive religious education in the language of his choice, whether individually or in association with others". Further, Principle 16(7) requires participating states to

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[210] These are dealt with in paras. 64–66 and 69–71 Vienna Concluding Document. Para. 64 refers to facilitating communication between institutions of higher education and research and direct personal contacts between scholars, para. 65 to ensuring access by students, teachers and scholars from other participating states to open information material available in public archives, libraries and research institutes, para. 66 to facilitating exchanges of school children between countries, para. 69 to encouraging radio and television organisations to consider exchanging the educational programmes they produce, para. 70 to encouraging co-operation and direct contacts between governmental organisations in the fields of education and science, and para. 71 to encouraging co-operation and contacts between specialised institutions and experts in the field of education and rehabilitation of handicapped children.

[211] Para. 67 Vienna Concluding Document.

[212] Para. 68 Vienna Concluding Document.

"respect the liberty of parents to ensure the religious and moral education of their children in conformity with their own convictions". It has been argued that, in view of the fear of communist countries at the time that recognition of these rights might promote the emancipation of ethnic, religious and linguistic groups, the said provisions should not be read as imposing duties on participating states to respect the relevant rights in the sphere of public education. The provisions have been stated to be directed at the private sphere, *i.e.* the family context and church communities.[213] Thus construed, the protection afforded under Principle 16 is not as far-reaching as that provided in terms of, for example, article 13(3) ICESCR, article 18(4) ICCPR or article 2 P-1 ECHR. The latter provisions expect states to respect the rights concerned in the sphere of public education, too. It is submitted, however, that against the background of the demise of communism and the emergence of democratic and pluralistic societies in Eastern Europe in the early 1990s, Principle 16 should now be read as also applying to the sphere of public education.

The CSCE/OSCE has given close attention to the issue of minority rights. Principle VII Final Act of Helsinki directs participating states to "respect the right of persons belonging to national minorities to equality before the law" and, further, to "afford them the full opportunity for the actual enjoyment of human rights and fundamental freedoms".[214] Similarly, Principle 19 Vienna Concluding Document instructs participating states to "protect and create conditions for the promotion of the ethnic, cultural, linguistic and religious identity of national minorities on their territory". States must "respect the free exercise of rights by persons belonging to such minorities and ensure their full equality with others". The provisions are not restricted to assuring that persons belonging to national minorities are treated in a non-discriminatory manner. States must also take active measures to protect and promote minority identity. As far as education and national minorities are concerned, paragraph 68 provides:

> [Participating states] will ensure that persons belonging to national minorities or regional cultures on their territories can give and receive instruction on their own culture, including instruction through parental transmission of language, religion and cultural identity to their children.

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[213] See Coomans, 1992, p. 146.

[214] Note should also be taken of the following provision under the title "Co-operation and Exchanges in the Field of Education" in the Final Act of Helsinki: "The participating States, recognising the contribution that national minorities or regional cultures can make to co-operation among them in various fields of education, intend, when such minorities or cultures exist within their territory, to facilitate this contribution, taking into account the legitimate interests of their members".

Reference has been made above to the fear of communist countries at the time that minority rights might lead to growing self-confidence on the part of minorities, claims for autonomy and, perhaps even, threats of secession. On this account, paragraph 68 would call for a narrow construction. But, the question must now be resolved in the light of subsequent developments.

The rights of (members of) minorities were dealt with extensively at the second of three special conferences on the "Human Dimension of the CSCE", which was held at Copenhagen, Denmark from 5 June to 29 July 1990.[215] The topic of minority rights was a delicate and emotional one for many participating states. Ultimately, in the very period preceding the Conference, minorities, which had been suppressed for many years in Eastern European countries, began to claim their rights. Many states saw their national and territorial integrity in jeopardy. At the Copenhagen Conference, a relatively large number of provisions on the situation of national minorities were accepted, contained in Part IV of the *Concluding Document of the Copenhagen Conference on the Human Dimension of the CSCE* of 1990. No other intergovernmental instrument deals with minority issues in such detail as the Copenhagen Concluding Document.

Paragraph 31 of the Document guarantees the principles of non-discrimination and full equality.[216] Paragraph 33 expresses the idea that the state must take positive measures directed at promoting the identity of national minorities.[217] Minority rights in the sphere of education are articulated in paragraphs 32(2) and (3) and 34. In terms of paragraph 32(2), persons belonging to national minorities have the right

> to establish and maintain their own educational, cultural and religious institutions, organisations or associations, which can seek voluntary financial and

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[215] The "Human Dimension of the CSCE" refers essentially to those commitments negotiated by participating states which relate to human rights issues. The "Human Dimension" is addressed for the first time in the Vienna Concluding Document. The Helsinki Document of the CSCE of 1992 provides for regular Human Dimension Implementation Meetings at which the implementation of undertakings in the area is to be reviewed.

[216] Para. 31 states, "Persons belonging to national minorities have the right to exercise fully and effectively their human rights and fundamental freedoms without any discrimination and in full equality before the law. The participating States will adopt, where necessary, special measures for the purpose of ensuring to persons belonging to national minorities full equality with the other citizens in the exercise and enjoyment of human rights and fundamental freedoms".

[217] Para. 33 states, "The participating States will protect the ethnic, cultural, linguistic and religious identity of national minorities on their territory and create conditions for the promotion of that identity. They will take the necessary measures to that effect after due consultations, including contacts with organisations or associations of such minorities, in accordance with the decision-making procedures of each State. Any such measures will be in conformity with the principles of equality and non-discrimination with respect to the other citizens of the participating State concerned".

> other contributions as well as public assistance, in conformity with national legislation.

Unfortunately, this provision does not guarantee financial assistance by the state for private minority schools. Under paragraph 32(3), persons belonging to national minorities further have the right ". . . to conduct religious educational activities in their mother tongue". Positive measures in the field of education benefiting members of national minorities are envisaged in paragraph 34, which provides as follows:

> The participating States will endeavour to ensure that persons belonging to national minorities, notwithstanding the need to learn the official language or languages of the State concerned, have adequate opportunities for instruction of their mother tongue or in their mother tongue, as well as, wherever possible and necessary, for its use before public authorities, in conformity with applicable national legislation.
>
> In the context of the teaching of history and culture in educational establishments, they will also take account of the history and culture of national minorities.

Regrettably, this provision does not recognise the need of persons belonging to national minorities to receive instruction *of and in* their mother tongue. The use of the clause "will endeavour to ensure" also weakens the provision.

Despite the weaknesses of the Copenhagen Concluding Document, it constitutes a definitive step forward when compared with the wording of article 27 ICCPR. Article 27 refers to the rights of persons belonging to national minorities in negative terms. The Copenhagen Document clearly recognises the duty of states to take positive measures.[218]

The undertaking to protect minority rights was reaffirmed at the Summit of Heads of State and Government, held at Paris, France (19–21 November 1990), and articulated in the *Charter of Paris for A New Europe* of 1990, under the heading "Human Rights, Democracy and Rule of Law".[219] Subsequent to the Follow-up Meeting held at Helsinki, Finland from 24 March to 8 July 1992, the Summit (9–10 July 1992) produced the *Helsinki Document of the CSCE* of 1992, entitled *The Challenges of Change*.[220] Part II of the document creates the position of a High Commissioner on National Minorities

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[218] See Coomans, 1992, p. 148.

[219] The Charter states, "We affirm that the ethnic, cultural, linguistic and religious identity of national minorities will be protected and that persons belonging to national minorities have the right freely to express, preserve and develop that identity without any discrimination and in full equality before the law".

[220] Part VI of the Helsinki Document of the CSCE on the "Human Dimension" provides for enhanced commitments and co-operation concerning, amongst others, questions relating to national minorities.

(HCNM). Under paragraph 23, the task of the HCNM is to provide "early warning" and, as appropriate, "early action" with regard to tensions involving national minority issues that have the potential to develop into a conflict within the CSCE area, affecting peace, stability or relations between participating states.[221] The first HCNM took up his duties on 1 January 1993. After almost four years of activity, the HCNM came to consider minority education as a topic of high priority among minority themes. In his view, education was an extremely important element for the preservation and the deepening of the identity of persons belonging to a national minority. On this account, he requested the Foundation on Inter-Ethnic Relations, a non-governmental organisation established to carry out specialised activities in support of the HCNM, in 1995 to consult a small group of experts with a view to receiving their recommendations on a coherent application of minority education rights in the OSCE region. This led to the formulation of the *Hague Recommendations Regarding the Education Rights of National Minorities* of 1996.[222] The Recommendations seek to clarify the content of minority education rights in the situations in which the HCNM is involved. As the Recommendations are premised on existing international human rights standards on minority rights, they constitute an ideal basis for a discussion of minority education rights in Chapter 9 of this book.[223]

3. *America*[224]

3.1. *General: The Charter of the Organisation of American States*

The right to education is comprehensively dealt with by the American human rights system. At the Ninth International Conference of American States, held at Bogotá, Columbia, American states adopted the *Charter of the Organisation of American States* on 30 April 1948.[225] It is also known as the "Pact of Bogotá". The Charter establishes the Organisation of American States (OAS).[226] It has been amended by the Protocols of Buenos Aires

[221] The HCNM only deals with situations. He does not receive individual petitions.

[222] Similar requests of the HCNM have resulted in the formulation of *inter alia* the *Oslo Recommendations Regarding the Linguistic Rights of National Minorities* of 1998 and the *Lund Recommendations on the Effective Participation of National Minorities in Public Life* of 1999.

[223] See 9.3.3.3.3.2. *infra*.

[224] The texts of instruments of the Organisation of American States are available on the website of the Organisation (www.oas.org). See also the website of the Human Rights Library of the University of Minnesota (www1.umn.edu/humanrts/index.html).

[225] Charter of the Organisation of American States (1948) OAS Treaty Series Nos. 1-C and 61, entered into force on 13 December 1951.

[226] The United States of America is also a member of the OAS.

(1967), Cartagena de Indias (1985), Washington (1992) and Managua (1993).[227] Among the functions of the Organisation are strengthening the peace and security of the continent, promoting democracy, advancing economic, social and cultural development and protecting human rights. Its principal organs are a General Assembly (being the supreme organ), the Meeting of Consultation of Ministers of Foreign Affairs, a Permanent Council and a General Secretariat, headed by a Secretary-General. Chapter XIII of the Charter, it should be noted, establishes an Inter-American Council for Integral Development.[228] Its purpose, in terms of article 94, is to promote co-operation among the American states for the purpose of achieving integral development in accordance with the standards of the Charter, "especially those set forth in Chapter VII with respect to the economic, social, *educational*, cultural, scientific, and technological fields".[229]

The OAS Charter, as amended, protects the right to education in articles 34(h), 49 and 50.[230] These articles form part of Chapter VII on "Integral Development". Article 30, the first article of the chapter, states that member states pledge themselves to a united effort to ensure integral development for their peoples. Integral development is said to encompass "the economic, social, *educational*, cultural, scientific, and technological fields through which the goals that each country sets for accomplishing it should be achieved".[231]

Article 34(h) identifies as a basic goal for achieving integral development, "[r]apid eradication of illiteracy and expansion of educational opportunities for all". Similarly, in terms of article 50, member states "will give special attention to the eradication of illiteracy [and] will strengthen adult and vocational education systems . . .". The most important provision, however, is article 49.[232] It obliges member states to exert "the greatest efforts"

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[227] *Protocol of Amendment to the Charter of the Organisation of American States* ("Protocol of Buenos Aires") (1967) OAS Treaty Series No. 1-A, entered into force on 27 February 1970, *Protocol of Amendment to the Charter of the Organisation of American States* ("Protocol of Cartagena de Indias") (1985) OAS Treaty Series No. 66, entered into force on 16 November 1988, *Protocol of Amendment to the Charter of the Organisation of American States* ("Protocol of Washington") (1992), entered into force on 25 September 1997 and *Protocol of Amendment to the Charter of the Organisation of American States* ("Protocol of Managua") (1993), entered into force on 29 January 1996.

[228] The Council exists since 1996.

[229] Author's italics.

[230] According to art. 3(n) OAS Charter, it is a principle of the OAS that "[t]he education of peoples should be directed toward justice, freedom, and peace".

[231] Author's italics.

[232] Art. 49 OAS Charter states, "The Member States will exert the greatest efforts, in accordance with their constitutional processes, to ensure the effective exercise of the right to education, on the following bases: (a) Elementary education, compulsory for children of school age, shall also be offered to all others who can benefit from it. When provided by the State it shall be without charge; (b) Middle-level education shall be extended to as

to ensure the effective exercise of the right to education. Under paragraph (a), *elementary education* is compulsory for children of school age. It must also be offered to all others who can benefit from it. When provided by the state, it must be "without charge". Paragraph (b) concerns *middle-level education*. Such education is to be extended progressively to as much of the population as possible. It must further be diversified. Paragraph (c) concerns *higher education*. Higher education must be available to all. Nevertheless, regulatory or academic standards must be met in order to maintain its high level.

3.2. *The American Declaration of the Rights and Duties of Man*

At the same Conference of American States at which the OAS Charter was adopted, the *American Declaration of the Rights and Duties of Man* was proclaimed on 2 May 1948.[233] The Declaration is similar in design and purpose to the UDHR.[234] Article XII of the Declaration is devoted to the right to education.[235] Article XII states:

> Every person has the right to an education, which should be based on the principles of liberty, morality and human solidarity.
>
> Likewise every person has the right to an education that will prepare him to attain a decent life, to raise his standard of living and to be a useful member of society.
>
> The right to an education includes the right to equality of opportunity in every case, in accordance with natural talents, merit and the desire to utilise the resources that the state or the community is in a position to provide.
>
> Every person has the right to receive, free, at least a primary education.

Article XII grants to every person the right to education. It sets out the aims of education in the first two paragraphs—the liberation of the individual in the first, and his socialisation in the second paragraph. The third paragraph lays down the principle of equal educational opportunities, the fourth proclaims the right to free education, at least at the primary level. Note should further be taken of article XXXI Declaration. This rather remarkable provision considers it to be "the *duty* of every person to acquire at least an elementary education".[236]

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much of the population as possible, with a view to social improvement. It shall be diversified in such a way that it meets the development needs of each country without prejudice to providing a general education; and (c) Higher education shall be available to all, provided that, in order to maintain its high level, the corresponding regulatory or academic standards are met".

[233] OAS Resolution XXX of 2 May 1948.

[234] The Declaration is a non-binding instrument.

[235] See Hodgson, 1998, pp. 60–61.

[236] Author's italics.

The supervision of the Declaration is entrusted to the Inter-American Commission on Human Rights.[237] In one case so far, the Commission had to decide whether article XII had been violated by a member state of the OAS.[238] In 1976, the president of Argentina had ordered that the office and all worship centres of the Jehovah's Witnesses be closed. Because they had adopted a firm stand in defence of the principles of Jehovah, more than 300 children were denied primary education by being dismissed from school or by being prevented from enrolling. Some continued their studies at home, with the intention of taking the examinations at the end of the school year with special examiners, but this was also denied them. The Commission decided that the state's action violated the right to equality of opportunity in education in article XII.

3.3. *The American Convention on Human Rights, and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights*

In 1969, the OAS adopted the *American Convention on Human Rights* (ACHR) (otherwise known as the "Pact of San José").[239] The ACHR protects mainly civil and political rights. Article 12(4) guarantees the right of parents or guardians "to provide for the religious and moral education of their children or wards that is in accord with their own convictions". For the rest, the Convention does not mention the right to education.[240] Article 26, however, obliges states parties "to adopt measures, both internally and through international co-operation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realisation of the rights implicit in the economic, social, *educational*, scientific, and cultural standards set forth in the [OAS Charter, as amended]".[241] The provision is reminiscent of article 2(1) ICESCR, which describes the nature of state obligations under that treaty with regard to ESCR. Reference should further be made to article 19, in terms of which, "[e]very minor child has the right to the measures of protection required by his condition as a minor on the part of . . . the state". It should be highlighted that "the right to education . . . stands

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[237] On the Inter-American Commission on Human Rights, see note 243 *infra*.

[238] *Jehovah's Witnesses*, Case 2137, Inter-American Commission on Human Rights 43, OAS Doc. OEA/Ser.L/V/II.47/Doc.13/Rev.1 (1979) (Annual Report 1978).

[239] American Convention on Human Rights (1969) OAS Treaty Series No. 36, entered into force on 18 July 1978. The United States of America has signed but not ratified the ACHR.

[240] See Hodgson, 1998, p. 61.

[241] Author's italics.

out among the special measures of protection for children and among the right recognised for them in article 19".[242]

The supervision of the ACHR is entrusted to the Inter-American Commission on Human Rights[243] and the Inter-American Court of Human Rights.[244] Article 42 ACHR provides for the submission by states parties of copies of the reports concerning economic, social, educational, scientific and cultural measures which they submit to the Inter-American Council for Integral Development, to the Commission "so that [it] may watch over the promotion of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the [OAS Charter, as amended]". The Commission is further competent to deal with individual petitions (submitted by persons, groups of persons or non-governmental entities)[245] and interstate communications.[246] Whereas the individual petition procedure applies automatically, the interstate petition procedure is optional. Where in a matter a friendly settlement has not been reached, the states parties or the Commission may submit the case to the Court.[247] The Court's jurisdiction must, however, be specifically recognised.[248] Judgements of the Court are final[249] and the states parties undertake to comply with judgements in cases to which they are parties.[250]

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[242] *Legal Status and Human Rights of the Child*, Advisory Opinion OC-17/2002 of the Inter-American Court of Human Rights of 28 August 2002, available on the Court's website at www.corteidh.or.cr, para. 84.

[243] The Commission is established by art. 106 OAS Charter. Chapter VII of the ACHR determines its organisation, functions, competence and procedure. The Commission is composed of independent experts (arts. 34 and 36 ACHR). Under art. 41 ACHR, the Commission's main function is to promote respect for and defence of human rights. "Human rights" means the rights set forth in the ACHR with regard to OAS member states who are party to the ACHR (see art. 2(a) Statute of the Commission of 1979) and the rights set forth in the Declaration with regard to OAS member states who are not party to the ACHR (see art. 2(b) Statute of the Commission of 1979). The Commission has various powers in relation to all OAS member states. These are set out in art. 18 of the Statute. It may, for example, make recommendations to states on the adoption of progressive measures in favour of human rights (art. 18(b)) or request states to submit reports on measures they adopt in matters of human rights (art. 18(d)). It may prepare studies and reports (art. 18(c)), respond to enquiries made by states (art. 18(e)) and conduct on-site observations in a state with the consent of the state in question (art. 18(g)). Art. 19 sets out additional powers with regard to states party to the ACHR and art. 20 with regard to states not party to the ACHR.

[244] The Court is established by art. 33(b) ACHR. Chapter VIII ACHR determines its organisation, jurisdiction and functions, and procedure. The Court is composed of judges who must possess legal qualifications and be human rights experts and who serve in an individual capacity (art. 52 ACHR).

[245] Art. 44 ACHR.

[246] Art. 45 ACHR.

[247] Art. 61 ACHR. Where a matter is not submitted to the Court, it is, in the absence of a settlement, eventually decided by the Commission (art. 51).

[248] Art. 62 ACHR.

[249] Art. 67 ACHR.

[250] Art. 68(1) ACHR.

In 1988, the OAS adopted an *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights* (AP ACHR) (otherwise known as the "Protocol of San Salvador").[251] Article 13 AP ACHR protects the right to education. The article states:

1. Everyone has the right to education.
2. The States Parties to this Protocol agree that education should be directed towards the full development of the human personality and human dignity and should strengthen respect for human rights, ideological pluralism, fundamental freedoms, justice and peace. They further agree that education ought to enable everyone to participate effectively in a democratic and pluralistic society and achieve a decent existence and should foster understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups and promote activities for the maintenance of peace.
3. The States Parties to this Protocol recognise that in order to achieve the full exercise of the right to education:
   (a) Primary education should be compulsory and accessible to all without cost;
   (b) Secondary education in its different forms, including technical and vocational secondary education, should be made generally available and accessible to all by every appropriate means, and in particular, by the progressive introduction of free education;
   (c) Higher education should be made equally accessible to all, on the basis of individual capacity, by every appropriate means, and in particular, by the progressive introduction of free education;
   (d) Basic education should be encouraged or intensified as far as possible for those persons who have not received or completed the whole cycle of primary instruction;
   (e) Programs of special education should be established for the handicapped, so as to provide special instruction and training to persons with physical disabilities or mental deficiencies.
4. In conformity with the domestic legislation of the States Parties, parents should have the right to select the type of education to be given to their children, provided that it conforms to the principles set forth above.
5. Nothing in this Protocol shall be interpreted as a restriction of the freedom of individuals and entities to establish and direct educational institutions in accordance with the domestic legislation of the States Parties.

Article 13 AP ACHR closely resembles article 13 ICESCR. Article 13(1) AP ACHR grants to everyone the right to education. Article 13(2) AP ACHR proceeds to set out the aims of education. Like article 13(1) ICESCR, it

[251] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (1988) OAS Treaty Series No. 69, entered into force on 16 November 1999. On the protection of the right to education by the Protocol, see Lonbay, 1988, pp. 662–675, Gomez del Prado, 1998, paras. 63–65 (UN Doc. E/C.12/1998/23) and Hodgson, 1998, pp. 61–62.

mentions: 1. the full development of the human personality, 2. the full development of human dignity, 3. the strengthening of respect for human rights and fundamental freedoms (adding here pluralism, justice and peace), 4. the preparation for effective participation in a free society (adding here the achievement of a decent existence), 5. the promotion of understanding, tolerance and friendship among various groups and persons and 6. the furtherance of activities for the maintenance of peace.

Article 13(3) AP ACHR contemplates the eventual full exercise of the right to education. The wording of article 13(3)(a) to (d) AP ACHR is largely identical to that of article 13(2)(a) to (d) ICESCR. Article 13(3)(a) AP ACHR envisages compulsory and free primary education for all. Under article 13(3)(b) AP ACHR, secondary education must be made generally available and accessible to all, in particular, by the progressive introduction of free education, under article 13(3)(c) AP ACHR, higher education must be made equally accessible to all, on the basis of capacity, in particular, by the progressive introduction of free education, and, under article 13(3)(d) AP ACHR, fundamental education (here termed "basic education") must be encouraged or intensified as far as possible. Article 13(3)(e) AP ACHR is new. It calls for the establishment of programmes of special education for the handicapped.[252] Article 13(3) AP ACHR reflects the social aspect of the right to education.

Article 13(4) AP ACHR grants to parents the right to select the type of education to be given to their children. Such education must conform to the aims of education of article 13(2). Article 13(5) AP ACHR protects the freedom of individuals and entities to establish and direct educational institutions. The reference in both paragraphs to domestic legislation directed at regulating the exercise of the right and the freedom must be understood as a reference to legislation which does not impose unreasonable restrictions. Article 13(4) and (5) AP ACHR reflect the freedom aspect of the right to education.

A rather unfortunate aspect of article 13 AP ACHR is its permissive language. Instead of requiring that states parties "shall" comply with the various obligations, article 13 states that states parties "should" comply with these obligations.

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[252] Note should be taken of the *Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities* of 1999, which entered into force on 14 September 2001. Art. III(1)(a) of the Convention obliges states parties to adopt measures to eliminate discrimination against persons with disabilities in the sphere of *inter alia* education. Art. III(2)(b) requires states parties to work on a priority basis in the areas of the "[e]arly detection and intervention, treatment, rehabilitation, education, job training, and the provision of comprehensive services to ensure the optimal level of independence and quality of life for persons with disabilities".

Note should further be taken of article 16 AP ACHR on the rights of children. The third sentence of article 16 reiterates that "every child has the right to free and compulsory education, at least in the elementary phase, and to continue his training at higher levels of the educational system".

As far as supervision of the Additional Protocol is concerned, article 19(1) AP ACHR instructs states parties to submit reports on the measures taken to ensure respect for the rights of the Additional Protocol. These are considered by the Inter-American Council for Integral Development.[253] A copy of the reports is also sent to the Inter-American Commission on Human Rights.[254] In terms of article 19(5), the Council must submit an annual report to the General Assembly, in which it must include the general recommendations it considers appropriate concerning state reports. Additionally, article 19(6) provides that where the rights in article 13 are violated by action directly attributable to a state party, this may give rise to application of the system of individual petitions governed by the ACHR.

3.4. *The Draft American Declaration on the Rights of Indigenous Peoples*

A topical issue in the American context is the theme of the rights of indigenous peoples. For many years, American society has treated indigenous peoples and their cultures with contempt. There have been numerous attempts to assimilate such peoples into mainstream society. Many of them have been forced to leave their traditional lands with which they had a distinctive material and spiritual relationship. As a result, they lost their economic base and became cut-off from their cultural roots. Today many indigenous peoples live on the fringes of society. It is against this background that the OAS envisages adopting an *American Declaration on the Rights of Indigenous Peoples* in the near future.[255]

"Indigenous education", *i.e.* education which takes account of the particular cultural characteristics of indigenous peoples, devised by indigenous peoples themselves and offered *inter alia* in the indigenous language by institutions operating on indigenous land, must be seen as one of the essen-

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[253] Art. 19(2) AP ACHR.

[254] Art. 19(2) AP ACHR.

[255] The discussion of the Draft American Declaration on the Rights of Indigenous Peoples below will be based on the consolidated text of the Draft Declaration prepared by the Chair of the Working Group to Prepare the Proposed American Declaration on the Rights of Indigenous Peoples of the Committee on Juridical and Political Affairs, a committee of the Permanent Council of the OAS. For the consolidated text, see OAS Doc. OEA/Ser.K/XVI—GT/DADIN/Doc.139/03 of 17 June 2003. The consolidated text is based on the original proposal of the Inter-American Commission on Human Rights of 1995 and takes into account the contributions, comments and proposals presented by states and indigenous peoples since the process of preparing the Draft Declaration began.

tial means of preserving the cultures of indigenous peoples and of enabling persons of indigenous origin to become successful members of their communities and of society at large.

Article XIV Draft Declaration protects the right to education of indigenous peoples. It states:

> 1. The States shall include in their national educational systems content that reflects the intercultural, multiethnic, and multilingual nature of their societies. The indigenous peoples have the right to bilingual intercultural education that incorporates their own world view, history, knowledge, values, spiritual practices, and ways of life.
> 2. Indigenous peoples have the right to:
>   (a) define and implement their own educational programs, institutions, and facilities;
>   (b) prepare and apply their own plans, programs, curricula, and teaching materials; and,
>   (c) educate, train, and accredit their teachers and administrators.
>
>   The States shall take the necessary measures to ensure that the indigenous education systems guarantee equal educational opportunity and teachers for the general population and complementarity with the national educational systems.
> 3. The States shall guarantee that the indigenous educational systems have the same level of quality, efficiency, accessibility, and in every other respect as those provided for the general population. In addition, the States shall facilitate access for indigenous children who live outside of their communities to learning in their own languages and cultures.
> 4. The States shall take measures to guarantee for the members of the indigenous peoples education of equal quality as for the general population at all levels. The States shall adopt effective measures to provide adequate resources for these purposes.

Like article 15 of the international *Draft Declaration on the Rights of Indigenous Peoples*,[256] article XIV(2) grants to indigenous peoples the right to establish their own educational systems. It refers to own institutions, curricula and teachers.[257] It appears that the American instrument accords a more proactive role to governments. Article XIV(2) instructs governments to ensure that indigenous educational systems guarantee equal educational opportunity for the general population and complementarity with national educational systems, and article XIV(3) instructs them to guarantee that indigenous educational systems have the same level of quality as those provided for the general population. As far as indigenous language rights in education are concerned, the second sentence of article XIV(1) states that indigenous

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[256] For a discussion of arts. 15 and 16 of the international Draft Declaration on the Rights of Indigenous Peoples, see 4.12. *supra*.

[257] Note should also be taken of art. XX Draft Declaration. It provides that indigenous peoples have the right to self-government with regard to *inter alia* education.

peoples, *within their particular communities*, have the right to bilingual education. Article XIV(3) states that indigenous children *who live outside of their communities* have the right to learning in the indigenous language. These provisions closely resemble the corresponding provisions of article 15 of the international Draft Declaration. By referring to "bilingual education", however, article XIV(1) makes it clear that it contemplates knowledge of the official language. The first sentence of article XIV(1) is comparable to article 16 of the international Draft Declaration. Both these provisions require the curriculum of national educational systems also to reflect the culture of indigenous peoples. Under article XIV(4), members of indigenous peoples have a right of access to education of equal quality as that for the general population at all levels. In the same way as article 15 of the international Draft Declaration, article XIV(4) expects states to provide adequate resources for the purposes of realising this right.

Once the Draft Declaration has been adopted by the OAS, it will establish non-binding standards regarding the rights of indigenous peoples for member states of the OAS.

4. *Africa*[258]

4.1. *General*

The right to education is also protected by the African human rights system. At a conference of Heads of State and Government of the member states of the Organisation of African Unity, held at Lomé, Togo, the *Constitutive Act of the African Union* was adopted on 12 June 2000.[259] The Act establishes the African Union (AU). It replaces the *Charter of the Organisation of African Unity*, which had established the Organisation of African Unity (OAU).[260] The objectives of the African Union include achieving greater unity and solidarity between African countries, accelerating the political and socio-economic integration of the continent, promoting peace, security and stability on the continent and, further, in terms of article 3(h) Constitutive Act, "[promoting and protecting] human and peoples' rights

[258] The texts of human rights instruments which have been adopted in the African context are available on the website of the African Union (www.africa-union.org). See also the website of the Human Rights Library of the University of Minnesota (www1.umn.edu/humanrts/index.html).

[259] Constitutive Act of the African Union (2000) OAU Doc. CAB/LEG/23.15, entered into force on 26 May 2001.

[260] Charter of the Organisation of African Unity (1963) 479 UNTS 39, entered into force on 13 September 1963.

in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments". The organs of the Union are an Assembly of the Union, an Executive Council, a Pan-African Parliament, a Court of Justice, a Commission, a Permanent Representatives Committee, Specialised Technical Committees (including a Committee on Education, Culture and Human Resources), an Economic, Social and Cultural Council and Financial Institutions.

4.2. *The African Charter on Human and Peoples' Rights*

The *African Charter on Human and Peoples' Rights* (ACHPR) (otherwise known as the "Banjul Charter") was adopted in 1981 by the former OAU.[261] Article 17(1) ACHPR states that "[e]very individual shall have the right to education". The Charter does not elaborate on this short formulation of the right to education.[262]

The supervision of the ACHPR is entrusted to the African Commission on Human and Peoples' Rights[263] and the African Court on Human and Peoples' Rights.[264] Article 62 instructs states parties to submit reports on the measures taken to give effect to the rights of the Charter. The former OAU authorised the Commission to consider these reports. The Commission is further competent to deal with communications from states parties[265] and other communications[266] (submitted by persons, groups of persons

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[261] African Charter on Human and Peoples' Rights (1981) OAU Doc. CAB/LEG/67/3Rev.5, entered into force on 21 October 1986.

[262] See Hodgson, 1998, p. 59.

[263] The Commission is established by art. 30 ACHPR. Part II ACHPR determines its organisation, mandate and procedure. The Commission is composed of independent experts (art. 30 ACHPR). Under art. 45 ACHPR, the Commission's functions are *inter alia* to promote human and peoples' rights, by collecting documents, undertaking studies, organising seminars and making recommendations to member states (art. 45(1)(a)) and by formulating principles upon which member states may base their legislation (art. 45(1)(b)), to ensure the protection of human and peoples' rights (art. 45(2)) and to interpret the provisions of the Charter (art. 45(3)).

[264] The Court is established by the *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights* (1998) OAU Doc. OAU/LEG/EXP/AFCHPR/PROT(III), entered into force on 25 January 2004. The Court is composed of judges who must be jurists and who must possess competence and experience in the field of human and peoples' rights. They serve in an individual capacity. See art. 11(1) Protocol.

[265] Arts. 48 and 49 ACHPR.

[266] Art. 55 ACHPR. When one or more communications apparently relate to special cases which reveal the existence of a series of serious or massive violations of human and peoples' rights, the Commission must draw the attention of the Assembly to these cases. The latter may then request the Commission to undertake an in-depth study and to make a report, accompanied by its findings and recommendations (art. 58 ACHPR).

or NGOs).[267] Both communication procedures apply automatically. Where in a matter a friendly settlement has not been reached, the Commission will decide the case. Subsequently, the states parties or the Commission may submit the case to the Court.[268] The Court may entitle NGOs and individuals to institute cases directly before it, provided the state party has made a declaration accepting the competence of the Court to receive such cases.[269] Judgements of the Court are final[270] and the states parties undertake to comply with judgements in cases to which they are parties.[271]

4.3. *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*

Provisions on the right to education as it accrues to women may be found in the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, which was adopted in 2003 by the AU, but which has not entered into force yet.[272] Article 12 Protocol protects the "Right to Education and Training". The article states:

1. States Parties shall take all appropriate measures to:
   (a) eliminate all forms of discrimination against women and guarantee equal opportunity and access in the sphere of education and training;
   (b) eliminate all stereotypes in textbooks, syllabuses and the media, that perpetuate such discrimination;
   (c) protect women, especially the girl-child from all forms of abuse, including sexual harassment in schools and other educational institutions and provide for sanctions against the perpetrators of such practices;
   (d) provide access to counselling and rehabilitation services to women who suffer abuses and sexual harassment;
   (e) integrate gender sensitisation and human rights education at all levels of education curricula including teacher training.
2. States Parties shall take specific positive action to:
   (a) promote literacy among women;
   (b) promote education and training for women at all levels and in all disciplines, particularly in the fields of science and technology;

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[267] In one case so far, the Commission had to decide whether art. 17 ACHPR had been violated by a state party. The case is referred to at 10.4.1.1.1. *infra* at note 65.

[268] Art. 5(1) Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.

[269] Art. 5(3) read with art. 34(6) Protocol.

[270] Art. 28(2) Protocol.

[271] Art. 30 Protocol.

[272] The text of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa is available on the website of the African Union (www. africa-union.org). As of 15 June 2004, there have been five ratifications, fifteen being required for the Protocol to enter into force.

(c) promote the enrolment and retention of girls in schools and other training institutions and the organisation of programmes for women who leave school prematurely.

The objective of article 12 Protocol—like that of article 10 of the international Convention on the Elimination of All Forms of Discrimination against Women—is to eliminate discrimination against women and to guarantee them equality of opportunity and treatment in the sphere of education and training. This is clearly expressed in article 12(1)(a) Protocol. Unlike the CEDAW, however, the Protocol does not list separate aspects in education with regard to which equality between men and women must be ensured. Article 12(1)(b) Protocol corresponds to article 10(c) CEDAW, to the extent that both provisions envisage the revision of textbooks with the aim of eliminating all stereotypes which perpetuate discrimination against women. Considering the serious problem of violence against girls in African schools, the duties laid down for states parties in article 12(1)(c) and (d) Protocol should be complied with as a matter of urgency, once the Protocol has entered into force. In terms of the stated provisions, states parties must take steps to protect girls from abuse in schools and offer counselling and rehabilitation services to those girls who have suffered abuse. Like the CEDAW, the Protocol contemplates extensive positive action in the sphere of education and training. The specific positive measures referred to in article 12(2) Protocol, namely, the promotion of literacy among women, of education and training for women at all levels and in all disciplines, and of the enrolment and retention of girls in schools, should not be regarded as constituting an exhaustive list, but rather as instances of positive measures to be taken by states parties.

A study of the Protocol reveals that education should fulfil the following aims:

- It should modify the social and cultural patterns of conduct of women and men with a view to achieving the elimination of harmful cultural and traditional practices (article 2(2) Protocol).
- It should, in the form of peace education, eradicate elements in beliefs, which legitimise violence against women (article 4(2)(d) Protocol).
- It should create awareness regarding harmful practices which negatively affect the human rights of women (article 5(a) Protocol).
- It should sensitise everyone to the rights of women (articles 8(c) and 12(1)(e) Protocol).
- It should, in the form of health and family planning education, promote the health, including the sexual and reproductive health, of women (article 14(1)(g) and (2)(a) Protocol).

The supervision of the Protocol is entrusted to the African Commission on Human and Peoples' Rights. In terms of article 26(1) Protocol, states parties must, in the reports they submit in accordance with article 62 ACHPR, indicate the measures taken to realise the rights of the Protocol. The Commission considers these reports. Regrettably—and unlike the Optional Protocol to the CEDAW—the Protocol does not make available an individual petition procedure.

4.4. *The African Charter on the Rights and Welfare of the Child*

Extensive provisions on the right to education may be found in the *African Charter on the Rights and Welfare of the Child* (ACRWC), which was adopted in 1990 by the former OAU.[273] Article 11 ACRWC protects the right to education. The article states:

1. Every child shall have the right to an education.
2. The education of the child shall be directed to:
   (a) the promotion and development of the child's personality, talents and mental and physical abilities to their fullest potential;
   (b) fostering respect for human rights and fundamental freedoms with particular reference to those set out in the provisions of various African instruments on human and peoples' rights and international human rights declarations and conventions;
   (c) the preservation and strengthening of positive African morals, traditional values and cultures;
   (d) the preparation of the child for responsible life in a free society, in the spirit of understanding, tolerance, dialogue, mutual respect and friendship among all peoples, ethnic, tribal and religious groups;
   (e) the preservation of national independence and territorial integrity;
   (f) the promotion and achievement of African Unity and Solidarity;
   (g) the development of respect for the environment and natural resources;
   (h) the promotion of the child's understanding of primary health care.
3. States Parties to the present Charter shall take all appropriate measures with a view to achieving the full realisation of this right and shall in particular:
   (a) provide free and compulsory basic education;
   (b) encourage the development of secondary education in its different forms and progressively make it free and accessible to all;
   (c) make higher education accessible to all on the basis of capacity and ability by every appropriate means;
   (d) take measures to encourage regular attendance at schools and the reduction of drop-out rates;

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[273] African Charter on the Rights and Welfare of the Child (1990) OAU Doc. CAB/LEG/24.9/49, entered into force on 29 November 1999. On the protection of the right to education by the Charter, see Gomez del Prado, 1998, paras. 67–74 (UN Doc. E/C.12/1998/23) and Hodgson, 1998, p. 59.

(e) take special measures in respect of female, gifted and disadvantaged children, to ensure equal access to education for all sections of the community.

4. States Parties to the present Charter shall respect the rights and duties of parents, and where applicable, of legal guardians to choose for their children schools, other than those established by public authorities, which conform to such minimum standards as may be approved by the State, and to ensure the religious and moral education of the child in a manner consistent with the evolving capacities of the child.
5. States Parties to the present Charter shall take all appropriate measures to ensure that a child who is subjected to school or parental discipline shall be treated with humanity and with respect for the inherent dignity of the child and in conformity with the present Charter.
6. States Parties to the present Charter shall take all appropriate measures to ensure that children who become pregnant before completing their education shall have an opportunity to continue with their education on the basis of their individual ability.
7. No part of this Article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions subject to the observance of the principles set out in paragraph 1 of this Article and the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

The ACRWC is the African counterpart of the CRC. It is instructive to compare the provisions of article 11 ACRWC with those of articles 28 and 29 CRC on the right to education.

Article 11(1) ACRWC grants to every child the right to education. Article 11(2) ACRWC proceeds to set out the aims of education. Like article 29(1) CRC, it mentions: 1. the full development of the child's personality, talents and mental and physical abilities,[274] 2. the strengthening of respect for human rights and fundamental freedoms,[275] 3. the preparation for effective participation in a free society,[276] 4. the promotion of understanding, tolerance and friendship among various groups and persons[277] and 5. the development of respect for the natural environment.[278] Whereas the CRC refers to education which develops the respect of the child for his parents and for his own and other cultures, the ACRWC considers it to be an aim of education to preserve and strengthen positive African morals, traditional values and cultures.[279] The ACRWC introduces three new educational aims, namely, the preservation of national independence

[274] Art. 29(1)(a) CRC/art. 11(2)(a) ACRWC.
[275] Art. 29(1)(b) CRC/art. 11(2)(b) ACRWC.
[276] Art. 29(1)(d) CRC/art. 11(2)(d) ACRWC.
[277] Art. 29(1)(d) CRC/art. 11(2)(d) ACRWC.
[278] Art. 29(1)(e) CRC/art. 11(2)(g) ACRWC.
[279] Art. 29(1)(c) CRC/art. 11(2)(c) ACRWC.

and territorial integrity in article 11(2)(e) ACRWC, the promotion of African Unity and Solidarity in article 11(2)(f) ACRWC and the promotion of the child's understanding of primary health care in article 11(2)(h) ACRWC. The former two must be understood in the light of the many years of struggle of the African peoples against foreign domination, in which they supported one another, and which eventually led to the emergence of newly independent African states. The latter reflects the need for individuals to enjoy a basic standard of health as a precondition for further social and economic development in Africa.

Article 11(3) ACRWC embodies the social aspect of the right to education. It instructs states parties to take "all appropriate measures" with a view to achieving "the full realisation" of the right to education. Article 11(3)(a) ACRWC envisages compulsory and free primary education (here termed "basic education"), article 11(3)(b) ACRWC encouraging the development of secondary education which is accessible to all, article 11(3)(c) ACRWC efforts to make higher education accessible to all, on the basis of capacity, and article 11(3)(d) ACRWC measures to encourage regular attendance at schools and the reduction of drop-out rates. Whereas article 11(3)(a) and (b) ACRWC differ in certain respects from article 28(1)(a) and (b) CRC, article 11(3)(c) and (d) ACRWC largely correspond to article 28(1)(c) and (e) CRC. It is noted with approval that the notion of progressiveness does not apply to the obligation with regard to primary education under the ACRWC, seeing that the obligation is not described in terms of the "making" available of primary education, as under the CRC. The obligation under the ACRWC is to "provide" compulsory and free primary education. It is also noted with approval that the ACRWC mandates the progressive introduction of free secondary education. The CRC mentions the progressive introduction of free secondary education only as a possible measure. Unlike the CRC, the ACRWC does not refer to vocational education, however. The ACRWC further does not enjoin states parties to make educational and vocational information and guidance available and accessible.[280] Article 11(3)(e) ACRWC introduces the provision that states parties must take special measures in respect of female, gifted and disadvantaged children, to ensure to them equal opportunities in education compared to the rest of the community.

Article 11(4) and (7) ACRWC embody the freedom aspect of the right to education. Article 11(4) ACRWC obliges states parties to respect the right of parents to choose for their children non-state schools, which conform to the minimum standards approved by the state. States parties must

[280] See art. 28(1)(d) CRC.

further respect the right of parents to ensure the religious and moral education of the child "in a manner consistent with the evolving capacities of the child". Article 11(4) ACRWC corresponds to article 13(3) ICESCR. The CRC lacks a corresponding provision. Article 11(4) ACRWC differs from article 13(3) ICESCR, however, in that it limits the right of parents as the child grows older. This is in accordance with recent trends in the international law of the child.[281] Article 11(7) ACRWC obliges states parties to respect the liberty of individuals and bodies to establish and direct educational institutions. The education provided at such institutions must observe the aims of education enunciated in article 11(1), and it must conform to such minimum standards as may be laid down by the states. Article 11(7) ACRWC is virtually identical to article 13(4) ICESCR and article 29(2) CRC.

Article 11(5) ACRWC requires school discipline to be administered in accordance with the inherent dignity of the child. Article 11(5) ACRWC is the equivalent of article 28(2) CRC.

A new provision is article 11(6) ACRWC. It requires states parties to take all appropriate measures to ensure that children, who become pregnant before completing their education, have an opportunity to continue with their education on the basis of their individual ability. Many African schools define pregnancy as a disciplinary offence, which usually leads to the expulsion of the pregnant girl from school. This sometimes precludes the girl from continuing her education. The practice of defining pregnancy as a disciplinary offence needs to be changed. It has been stated that "[t]he coming into force in November 1999 of the [ACRWC], which includes an explicit requirement that States ensure that pregnant girls have an opportunity to continue with their education, is likely to increase the momentum for change".[282]

Educational rights are also protected in certain other articles of the ACRWC. Article 13 ACRWC concerns handicapped children. Article 13(2) states that "States Parties . . . shall ensure that the disabled child has effective access to training . . . in a manner conducive to the child's achieving the fullest possible social integration, individual development and his cultural and moral development". Article 20 ACRWC concerns parental responsibilities. Article 20(2)(a) provides that states parties have the obligation "in accordance with their means and national conditions to take all appropriate measures", "to assist parents . . . and in case of need provide material assistance and support programmes particularly with regard to nutrition,

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[281] For a discussion of the child's right to education versus the right of parents, see 10.5.1.3.6. *infra.*

[282] Tomaševski, 2000, para. 58 (UN Doc. E/CN.4/2000/6).

health, *education*, clothing and housing".[283] Article 23 ACRWC concerns refugee children. Article 23(1) obliges states parties "to take all appropriate measures to ensure that [refugee children] . . . receive appropriate protection . . . in the enjoyment of the rights set out in [the ACRWC] . . .", the right to education in article 11 ACRWC being, of course, one of the rights.

The supervision of the ACRWC is entrusted to the Committee on the Rights and Welfare of the Child,[284] a body composed of independent experts.[285] Article 43(1) ACRWC instructs states parties to submit reports on the measures taken to give effect to the rights of the Charter. The reports are considered by the Committee.[286] The Committee is further competent to deal with communications from states parties and communications submitted by persons, groups of persons or NGOs.[287] The communication procedure applies automatically. Under article 45(1), the Committee is further empowered to resort to any appropriate method of investigating any matter falling within the ambit of the Charter, to request from states parties any information relevant to the implementation of the Charter, and to resort to any appropriate method of investigating the measures which states parties have adopted to implement the Charter.

5. *Certain other Regional Contexts*

The right to education is also recognised by instruments adopted in certain other regional contexts. In the following, reference will briefly be made to instruments prepared by Arab/Islamic states, and also to the *Convention on Human Rights and Fundamental Freedoms of the Commonwealth of Independent States*.

5.1. *Arab/Islamic States*

Instruments protecting the right to education have been adopted, which are specifically applicable to Arab/Islamic states.

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[283] Author's italics.

[284] Art. 32 ACRWC. Under art. 42 ACRWC, the Committee's functions are *inter alia* to promote the rights of the Charter, by collecting information, commissioning inter-disciplinary assessments, organising meetings and making recommendations to member states (art. 42(a)(i)) and by formulating principles aimed at protecting the rights and welfare of children in Africa (art. 42(a)(ii)), to ensure the protection of the rights of the Charter (art. 42(b)) and to interpret the provisions of the Charter (art. 42(c)).

[285] Art. 33(1) and (2) ACRWC.

[286] Art. 43(2) ACRWC.

[287] Art. 44(1) ACRWC.

Article XXI on the "Right to Education" of the non-binding *Universal Islamic Declaration of Human Rights* of 1981, said to be based on the Qur'an and the Sunnah,[288] states:

> (a) Every person is entitled to receive education in accordance with his natural capabilities.
> (b) Every person is entitled to a free choice of profession and career and to the opportunity for the full development of his natural endowments.[289]

Article 9 of the non-binding *Cairo Declaration on Human Rights in Islam* of 1990[290] states:

> (a) The seeking of knowledge is an obligation and provision of education is the duty of the society and the State. The State shall ensure the availability of ways and means to acquire education and shall guarantee its diversity in the interest of the society so as to enable man to be acquainted with the religion of Islam and uncover the secrets of the Universe for the benefit of mankind.
> (b) Every human being has the right to receive both religious and worldly education from the various institutions of education and guidance, including the family, the school, the university, the media, *etc.*, and in such an integrated and balanced manner that would develop human personality, strengthen man's faith in Allah and promote man's respect to and defence of both rights and obligations.[291]

It is an open question whether the above declarations and the provisions thereof on the right to education are in accordance with human rights standards as formulated in the UN context. The 1981 Declaration, in its preamble, considers human rights to be decreed by the Islamic Shari'ah. The 1990 Declaration states in article 24 that all rights in the Declaration are subject to the Shari'ah. In the end, much will depend on whether that term is interpreted in a way which reinforces or undermines internationally accepted human rights standards.

Article 41 of the *Arab Charter on Human Rights*, an international agreement, adopted in 2004, but not in force yet,[292] states:

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[288] The Declaration has been compiled by eminent Muslim scholars, jurists and representatives of Islamic movements and thought.

[289] The Arabic text of the Declaration is the original. For an English translation, see the website of the Al-Hewar Center (Center for Arab Culture and Dialogue) (www.alhewar.com).

[290] The Declaration has been adopted by the Nineteenth Islamic Conference of Foreign Ministers, held at Cairo, Egypt from 31 July–5 August 1990.

[291] The Arabic text of the Declaration is the original. For an English translation, see the website of the Human Rights Library of the University of Minnesota (www1.umn.edu/humanrts/index.html).

[292] The Council of the League of Arab States endorsed the Arab Charter on 4 March 2004. The Summit of Arab States, held at Tunis, Tunisia from 22–23 May 2004, adopted it. The Arabic text of the Charter is the original. The English translation has been made

1. The eradication of illiteracy is a binding obligation upon the State and everyone has the right to education.
2. The States parties shall guarantee their citizens free education at least throughout the primary and basic levels. All forms and levels of primary education shall be compulsory and accessible to all without discrimination of any kind.
3. The States parties shall take appropriate measures in all domains to ensure partnership between men and women with a view to achieving national development goals.
4. The States parties shall guarantee to provide education directed to the full development of the human person and to strengthening respect for human rights and fundamental freedoms.
5. The States parties shall endeavour to incorporate the principles of human rights and fundamental freedoms into formal and informal education curricula and educational and training programmes.
6. The States parties shall guarantee the establishment of the mechanisms necessary to provide ongoing education for every citizen and shall develop national plans for adult education.

Article 30(3) states:

> Parents or guardians have the freedom to provide for the religious and moral education of their children.[293]

The Arab Charter of 2004 is a revised version of the Arab Charter on Human Rights of 1994. No state ever ratified the Arab Charter of 1994 and it never entered into force.[294] The 1994 Arab Charter addressed the right to education in article 34. Article 34 stated:

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available by the Office of the UNHCHR. The Charter envisages supervision by an "Arab Human Rights Committee", a body composed of independent experts (art. 45). It provides for a state reporting system. States parties are obliged to submit reports which are then considered by the Committee (art. 48).

[293] A number of other provisions of the Arab Charter also have a bearing on the right to education. Art. 34(3) on child labour, clearly based on art. 32 CRC, states in part, "The States parties recognise the right of the child to be protected from economic exploitation and from being forced to perform any work that is likely to be hazardous or to interfere with the child's education or to be harmful to the child's health or physical, mental, spiritual, moral or social development". Art. 39(2)(c) makes the promotion of health education an obligation of states parties. Art. 40 on the rights of disabled persons, a positive provision of the Arab Charter, states in para. (4), "The States parties shall provide full educational services suited to persons with disabilities, taking into account the importance of integrating these persons in the educational system and the importance of vocational training and apprenticeship and the creation of suitable job opportunities in the public or private sectors".

[294] The Council of the League of Arab States endorsed the Arab Charter of 1994 by Resolution 5437 of 15 September 1994. For the text of the Charter, see *Human Rights Law Journal*, Vol. 18, 1997, pp. 151 *et seqq*. The Charter envisaged supervision by a committee of independent experts (art. 40) and provided for a state reporting system (art. 41).

> The eradication of illiteracy is a binding obligation and every citizen has a right to education. Primary education, at the very least, shall be compulsory and free and both secondary and university education shall be made easily accessible to all.

Positive aspects of the revised Charter are the inclusion of the aims of education in article 41(4), requiring that education be directed to developing the human person and strengthening respect for human rights and fundamental freedoms, and the obligation of states parties in article 41(5) to include human rights education in educational curricula. Another positive feature is article 30(3) on the right of parents to provide for the religious and moral education of their children. In an important respect, however, the revised Charter does not conform to international human rights standards. Article 41(2) should have guaranteed the right of everyone, not only of citizens, to free and compulsory primary education. Also the general reservation of the rights to "ongoing" and adult education to citizens in article 41(6) is problematic.[295]

5.2. *The Commonwealth of Independent States*

The right to education is further protected in the context of the Commonwealth of Independent States (CIS). The Commonwealth of Independent States includes the former republics of the Soviet Union, excluding the three Baltic states. Article 27 of the *Convention on Human Rights and Fundamental Freedoms of the Commonwealth of Independent States* of 1995[296] states:

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[295] See 9.3.3.1. *infra.*

[296] Council of Europe Doc. H(95) 7 rev. and Human Rights Information Sheet No. 36 (Jan.–Jun. 1995) H/Inf (95) 3, pp. 195–206. The Convention entered into force on 11 August 1998. For a short note on the Convention, see McBride, J., "A treaty of dubious value: The CIS Human Rights Convention", in: *Interrights Bulletin*, Vol. 9, No. 4, 1995, pp. 137–140. The Convention is supervised by the Human Rights Commission of the Commonwealth of Independent States (art. 34), a body composed of representatives of states parties, which is competent to hear interstate petitions (section II Regulations of the Human Rights Commission) and individual and collective petitions (section III Regulations of the Human Rights Commission). The Parliamentary Assembly of the Council of Europe, in its Resolution 1249 (2001) on the coexistence of the CIS Convention and the ECHR, stated that it remained concerned about the compatibility of the two conventions. In para. 4, the Assembly held that "[t]he CIS Convention offers less protection than the ECHR, both with regard to the scope of its contents, and with regard to the body enforcing it—the CIS Commission cannot offer the guarantees of impartiality and independence offered by the European Court of Human Rights, nor do its recommendations enjoy the same enforceable character as judgements issued by that Court". In para. 6, the Assembly thus recommended to those Council of Europe member states which are also members of the CIS not to sign or ratify the CIS Convention, or, where they have already ratified it, to issue a legally-binding declaration confirming that the procedure set out in the ECHR will not be in any way replaced or weakened through recourse to the procedure set out in the CIS Convention.

1. No person shall be denied the right to education. In the exercise of any functions which the Contracting Parties assume in relation to education and to teaching, they shall respect the right of parents to ensure for their children such education and teaching as corresponds to their own convictions and national traditions.
2. Elementary and fundamental education of a general kind shall be compulsory and free of charge.
3. Each Contracting Party shall set a minimum age up to which secondary education shall be compulsory and which may not be lower than the minimum age for employment established by law in accordance with internationally recognised standards.

Article 27(1) is clearly based on article 2 P-1 ECHR. Rather than referring to parents' "religious and philosophical convictions", though, it mentions their "convictions and national traditions", which would seem to be a wider concept. As in the case of article 2 P-1 ECHR, the negative formulation is unfortunate. This is partially compensated for by article 27(2), which, conforming to article 13(2)(a) ICESCR, obliges states parties to provide compulsory and free primary education. A commendable provision is article 27(3). In terms thereof, secondary education would have to be compulsory up to the age of at least 14 or 15.[297]

[297] See 6.3.2.2. *infra*.

CHAPTER SIX

THE PROTECTION OF THE RIGHT TO EDUCATION BY LEGAL INSTRUMENTS OF THE UNITED NATIONS SPECIALISED AGENCIES

1. *Introduction*

This Chapter deals with the protection of the right to education by legal instruments adopted by the United Nations Specialised Agencies. The Specialised Agencies implicated are the United Nations Educational, Scientific and Cultural Organisation (UNESCO) and the International Labour Organisation (ILO).[1] The term "instrument" refers not only to conventions, but also to soft-law documents, principally in the form of recommendations and declarations. The discussion will commence with some introductory remarks concerning UNESCO. The focus will be on the mandate and organisational structure of UNESCO, the role of UNESCO in the context of the International Covenant on Economic, Social and Cultural Rights, the setting of international educational standards by UNESCO and the monitoring of such standards by UNESCO. UNESCO's system of consultations based on state reports and its complaints procedure will be referred to. Thereafter, the legal instruments prepared by UNESCO in the execution of its normative function in the field of education will be briefly introduced. A few words will further be said on the supervision of each of the instruments. Primary consideration will be given to the *Convention against Discrimination in Education* of 1960. Articles 1 to 5 of the Convention, like articles 13 and 14 ICESCR and articles 28 and 29 CRC, may be

[1] Although not a UN Specialised Agency, mention should also be made of the United Nations Children's Fund (UNICEF). UNICEF was founded in 1946 by the UN General Assembly to help mend the lives of children whose countries had been ravaged by World War II. Ever since, UNICEF assists children affected by war and other emergencies, such as droughts, floods or famine. Throughout the years, UNICEF's activities have been broadened, so that today it carries out programmes of co-operation in many countries in the areas of health, nutrition, water supply and sanitation, and *education*. The general mandate of UNICEF has been said to be promoting universal implementation of the Convention on the Rights of the Child, which, as has been seen, protects the right to education in arts. 28 and 29. See *A Guide to Information at the United Nations*, New York: UN, 1995 (UN Sales No. E.95.I.4), pp. 24–25. UNICEF produces an annual report on the *State of the World's Children*. Its 1999 report bears the title "Education", and deals exclusively with that topic. UNICEF is not involved in setting normative standards in the same way as UNESCO or the ILO, however. For more information on UNICEF, see its website at www.unicef.org.

said to constitute a codification of the right to education in international law. Also the ILO has prepared legal instruments which are relevant to the right to education. Of special importance are those instruments which seek to outlaw child labour and to safeguard the child's educational interests. Notable in this respect are the *Convention concerning Minimum Age for Admission to Employment* of 1973 and the *Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour* of 1999. The ILO has further adopted a *Convention concerning Indigenous and Tribal Peoples in Independent Countries* in 1989. Part VI of this Convention is devoted to the right to education of indigenous peoples. A short note on these ILO instruments and their supervision concludes this Chapter.

2. *Instruments of the United Nations Educational, Scientific and Cultural Organisation (UNESCO)*[2]

2.1. *Introductory Remarks Concerning UNESCO*[3]

In November 1945, the governments of the United Kingdom and France convened a Conference for the Establishment of an Educational, Scientific and Cultural Organisation in London. The Conference drafted the *Constitution of the United Nations Educational, Scientific and Cultural Organisation*[4] and resolved that its headquarters be located in Paris. UNESCO came into being on 4 November 1946. On 14 December the same year, it was brought into relationship with the UN as a Specialised Agency.[5] Presently, UNESCO has 190 members.[6]

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[2] The texts of instruments of the United Nations Educational, Scientific and Cultural Organisation (UNESCO) are available on the website of the Organisation (www.unesco.org).

[3] On the protection of human rights by UNESCO, see, for example, chapter 13 by Coomans, F., "UNESCO and human rights", in: R. Hanski and M. Suksi (eds.), *An Introduction to the International Protection of Human Rights: A Textbook*, second edition, Åbo: Institute for Human Rights (Åbo Akademi University), 1999.

[4] The text of the Constitution of the United Nations Educational, Scientific and Cultural Organisation is available on UNESCO's website.

[5] This was effected by UNGA Resolution 50(I). In terms of art. 57 UN Charter, intergovernmental organisations with international responsibilities in economic, social, cultural, educational or health fields are to be brought into relationship with the UN, thereby becoming "specialised agencies" of the UN. Art. 63 UN Charter provides for the terms on which any such organisation is brought into relationship with the UN to be laid down in agreements, which the Economic and Social Council enters into with the organisation concerned.

[6] This figure is shown on UNESCO's website on 28 December 2004.

2.1.1. *The Mandate and Organisational Structure of UNESCO*

The general mandate of UNESCO is to build lasting world peace founded upon the intellectual and moral solidarity of mankind. Its areas of action are education, natural sciences, social and human sciences, culture and communication.[7] Article I(1) of the UNESCO Constitution states:

> The purpose of the Organisation is to contribute to peace and security by promoting collaboration among the nations through education, science and culture in order to further universal respect for justice, for the rule of law and for the human rights and fundamental freedoms which are affirmed for the peoples of the world, without distinction of race, sex, language or religion, by the Charter of the United Nations.

Article I(2) goes on to state that, to realise this purpose, UNESCO must:

(a) Collaborate in the work of advancing the mutual knowledge and understanding of peoples, through all means of mass communication and to that end recommend such international agreements as may be necessary to promote the free flow of ideas by word and image;
(b) Give fresh impulse to popular education and to the spread of culture:
By collaborating with Members, at their request, in the development of educational activities;
By instituting collaboration among the nations to advance the ideal of equality of educational opportunity without regard to race, sex or any distinctions, economic or social;
By suggesting educational methods best suited to prepare the children of the world for the responsibilities of freedom;
(c) Maintain, increase and diffuse knowledge:
By assuring the conservation and protection of the world's inheritance of books, works of art and monuments of history and science, and recommending to the nations concerned the necessary international conventions;
By encouraging co-operation among the nations in all branches of intellectual activity, including the international exchange of persons active in the fields of education, science and culture and the exchange of publications, objects of artistic and scientific interest and other materials of information;
By initiating methods of international co-operation calculated to give the people of all countries access to the printed and published materials produced by any of them.

UNESCO consists of three organs, a General Conference, an Executive Board and a Secretariat.[8] The *General Conference* is the organisation's decision-making body. It is composed of representatives of the member states

[7] See *A Guide to Information at the United Nations*, New York: UN, 1995 (UN Sales No. E.95.I.4), pp. 78–79.
[8] Art. III UNESCO Constitution.

of the organisation[9] and meets every two years.[10] It determines the policies and the main lines of work of the organisation and approves its programme and budget.[11] It further elects the members of the Executive Board and appoints the Director-General.[12] The *Executive Board* is composed of fifty-eight member states.[13] The Board meets between the sessions of the General Conference, at least twice a year.[14] It is responsible for the execution of the two-year programme.[15] The *Secretariat* is composed of a Director-General and staff.[16] The Director-General is the chief administrative officer of the organisation and is appointed for a period of four years.[17] The Secretariat, in fact, implements UNESCO's programme. Each member state is called upon to set up a National Commission "for the purpose of associating its principal bodies interested in educational, scientific and cultural matters with the work of the organisation", which Commission should be broadly representative of the government and such bodies.[18] The function of a Commission is to act in an advisory capacity to the member state's delegation to the General Conference, its representative on the Executive Board (where it is a member of the Board) and its government in matters relating to UNESCO, and to function as an agency of liaison in all matters of interest to it.[19]

Education constitutes the major activity of UNESCO. This is evidenced by the fact that about thirty-five per cent of its budget is spend on educational programmes.[20] In education, UNESCO's priorities are to eliminate illiteracy and to secure basic education for all, to promote what may be termed "international education", *i.e.* education for international understanding, co-operation and peace and education relating to human rights and fundamental freedoms, and to eradicate discrimination from national

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[9] Art. IV(1) UNESCO Constitution. A member state may appoint up to five delegates (art. IV(1)).

[10] Art. IV(9)(a) UNESCO Constitution.

[11] Art. IV(2) UNESCO Constitution. The Director-General is required to prepare a draft programme of work with corresponding budget estimates (art. VI(3)(a)). Subsequently, the Executive Board must examine the Director-General's programme of work and budget estimates and makes recommendations thereon (art. V(6)(a)). Eventually, the General Conference must decide on the programme and budget.

[12] Art. IV(7) UNESCO Constitution.

[13] Art. V(1)(a) UNESCO Constitution. Each member of the Executive Board must appoint one representative (art. V(2)(a)).

[14] Art. V(9) UNESCO Constitution.

[15] Art. V(6)(b) UNESCO Constitution.

[16] Art. VI(1) UNESCO Constitution.

[17] Art. VI(2) UNESCO Constitution.

[18] Art. VII(1) UNESCO Constitution.

[19] Art. VII(2) UNESCO Constitution.

[20] See *A Guide to Information at the United Nations*, New York: UN, 1995 (UN Sales No. E.95.I.4), pp. 78–79.

education systems. Other priorities are to develop technical and vocational education, higher education and adult education, to help train teachers and educational planners and administrators, and to encourage local building and equipping of schools.[21] To achieve its aims, UNESCO performs various activities. It sets and monitors the realisation of international educational standards, it gathers and disseminates information of educational interest, it provides advisory services and technical assistance to member states and assists them in the setting up of educational institutions and centres, it organises congresses, seminars and symposia, and it provides subsidies to certain NGOs.[22] Since 1991, UNESCO further publishes the *World Education Report*, a biennial series analysing trends and policy issues in education.[23] Presently, it is the setting and monitoring of international educational standards which will be dealt with in some detail.

2.1.2. *UNESCO and the International Covenant on Economic, Social and Cultural Rights*

Before discussing UNESCO's efforts directed at setting and monitoring international educational standards, and before dealing with the individual legal instruments on education adopted by UNESCO and their supervision, the special role of UNESCO in the drafting of articles 13 and 14 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), in the implementation of the stated articles, and in the discussion by the Committee on Economic, Social and Cultural Rights of state reports, submitted under the Covenant, in as far as they relate to the said articles, should briefly be set out.[24]

UNESCO played a seminal role in *the drafting of articles 13 and 14 ICESCR*.[25] The organisation was regularly represented at the meetings of the bodies which drafted the Covenant, *i.e.* the Commission on Human Rights and the Third Committee of the General Assembly (dealing with social, humanitarian and cultural matters), and actively participated in the

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[21] For up-to-date information on UNESCO's activities in the field of education, see its website at www.unesco.org.

[22] See UNESCO's website.

[23] The 1991 report reviewed the worldwide expansion of enrolments in formal education since 1970, the theme of the 1993 report was "education in a world of adjustment and change", the 1995 report addressed the education of women and girls, the 1998 report dealt with teachers and teaching in a changing world, and the theme of the 2000 report was "towards education for all throughout life".

[24] On UNESCO's role in this regard, see also Gebert, 1996, pp. 64–69. See further the discussion on encouraging the active participation of UNESCO in the supervision of the ICESCR by the Committee on Economic, Social and Cultural Rights at 12.3.1.2.3. *infra*.

[25] On the role of the UN Specialised Agencies in the drafting of the ICESCR, see Alston, 1979, pp. 82 *et seqq*.

debates. In fact, UNESCO had introduced an own proposal on the right to education, which substantially influenced the present form and content of articles 13 and 14 ICESCR.[26]

The UN Specialised Agencies are accorded a special responsibility in *the implementation of the ICESCR*:[27]

- In terms of article 16(1) ICESCR, states parties must submit reports on the measures which they have adopted and the progress made in achieving the observance of the rights of the Covenant for consideration by the Committee on Economic, Social and Cultural Rights.[28] Article 16(2)(b) provides for the transmission to the Specialised Agencies of copies of the reports from those states parties which are also members of these Specialised Agencies, in so far as the reports, or parts therefrom, relate to any matters which fall within the responsibilities of the said Specialised Agencies. This makes it possible for the Specialised Agencies to adjudge the level of and the difficulties in the realisation of the Covenant in individual states parties and, where appropriate, to grant them technical assistance.
- In terms of article 18 ICESCR, the Specialised Agencies are competent to prepare reports for consideration by the Committee on Economic, Social and Cultural Rights, in which they report on the progress made in achieving the observance of the Covenant rights falling within the scope of their activities. These reports may include particulars of decisions and recommendations which have been adopted by the Specialised Agencies. The reports serve to inform the Committee of the activities of

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[26] The importance of the proposal warrants citing it in full. It stated, "*Article (a)* The signatory States recognise: 1. that everyone has the right to education; 2. that primary education should be free and compulsory; 3. that secondary education, in its different forms, including technical and professional education, should be generally available and should be made progressively free; 4. that higher education should be equally accessible to all on the basis of merit; 5. that education should encourage respect for human rights and understanding, and tolerance between all nations. Each signatory State pledges itself to undertake progressively, with due regard to its organisation and resources, and in accordance with the principle of non-discrimination enunciated in paragraph 1 of Article 1 of this Covenant, all measures necessary to attain these objectives in all the territories within its jurisdiction. *Article (b)* Each signatory State which, at the time of becoming a party to this Covenant, has not been able to secure in all territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a number of years to be fixed in the plan, of the principle of compulsory primary education free of charge for all. *Article (c)* The signatory States undertake to encourage as far as possible the fundamental education of these persons who have not received or completed the whole period of primary education".

[27] On the role of the UN Specialised Agencies in the implementation of the ICESCR, see Alston, 1979, pp. 93 *et seqq*.

[28] In terms of art. 17(3) ICESCR, relevant information which has previously been furnished to the UN or to any Specialised Agency, need not be reproduced in the report but a precise reference to such information suffices.

the Specialised Agencies, which is important in the light of the Committee's function of further developing economic, social and cultural rights.[29]

- Article 19 ICESCR provides that the reports so submitted may be transmitted by the Economic and Social Council (ECOSOC) to the Commission on Human Rights for study and general recommendations or for information. The Commission may thus make general recommendations on the reports. The Specialised Agencies, in turn, may, under article 20 ICESCR, make comments to ECOSOC on any general recommendation. Also this consultation mechanism is intended to facilitate the further development of economic, social and cultural rights.
- Article 22 ICESCR states that the Committee on Economic, Social and Cultural Rights may bring to the attention of Specialised Agencies any matters arising out of the reports submitted by states parties which may assist them in deciding on the advisability of international measures likely to contribute to the effective progressive implementation of the ICESCR.
- In terms of article 23 ICESCR, the states parties agree that international measures for the achievement of the rights of the Covenant include such measures as the conclusion of conventions, the adoption of recommendations, the furnishing of technical assistance and the holding of regional and technical meetings for the purpose of consultation and study. Although article 23 does not expressly identify the Specialised Agencies as (co-)sponsors of such measures, this can be deduced if article 23 is read together with article 22.

The UN Specialised Agencies are further assigned a role in *the discussion* by the Committee on Economic, Social and Cultural Rights *of state reports*, submitted under the ICESCR.[30] Rule 68 of the Committee's Rules of Procedure[31] invites the Specialised Agencies to designate representatives to participate at the meetings of the Committee. The representatives "may make statements on matters falling within the scope of the activities of their respective organisations in the course of the discussion by the Committee of the report of each State party to the Covenant". UNESCO has been represented at all sessions of the Committee thus far.

The co-operation between UNESCO and the Committee has grown significantly during the more recent past.[32] A prominent role is now given

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[29] To this writer's knowledge, UNESCO thus far submitted three reports to the Committee on Economic, Social and Cultural Rights on its activities in the sphere of arts. 13–15 ICESCR, contained in UN Docs. E/1982/10, E/1988/7 and E/1990/8.

[30] On the role of the UN Specialised Agencies in the consideration of state reports submitted under the ICESCR, see Craven, 1995, pp. 76–80.

[31] The Rules of Procedure of the Committee on Economic, Social and Cultural Rights are contained in UN Doc. E/C.12/1990/4/Rev.1.

[32] This is maintained by the information document prepared by the Secretariat for the

to UNESCO in the "Concluding Observations" made by the Committee after considering state reports, recommending to states parties further action in the implementation of Covenant rights, in particular that they seek assistance from UNESCO. UNESCO has started sharing with the Committee the reports submitted to it by member states and other information concerning the implementation of UNESCO Conventions and Recommendations relating to the right to education, in view of their relevance to the constructive dialogue maintained by the Committee with states parties in supervising the Covenant. It may further be mentioned that General Comment No. 13 on the right to education (protected in article 13 ICESCR),[33] to be referred to in subsequent Chapters, has been elaborated by the Committee in co-operation with UNESCO. The General Comment draws on the normative instruments and experience of UNESCO. The latest development concerning co-operation between UNESCO and the Committee relates to the creation of a joint UNESCO/Committee on Economic, Social and Cultural Rights expert group on the right to education, which discusses issues of common concern arising from the right to education and, where pertinent, formulates appropriate suggestions and recommendations. More will be said on this expert group in Chapter 12 below.[34]

2.1.3. *The Setting of International Educational Standards by UNESCO*

It has been stated that article 23 ICESCR stipulates that international action for the achievement of the rights of the Covenant includes, amongst others, the conclusion of conventions and the adoption of recommendations. It has also been stated that this is essentially the responsibility of the UN Specialised Agencies. This is in accordance with the general conception of the ICESCR. The *travaux préparatoires* of the ICESCR show that the drafters of the Covenant intended that its rights provisions should be framed in rather general terms and that it should be the task of the Specialised Agencies to transform these into detailed rules. UNESCO's normative activities in the field of education must be seen in the context of article 23 ICESCR.[35] UNESCO has prepared diverse instruments on the topic of education. In so doing, it has contributed significantly to giving

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Informal Meeting on Monitoring the Right to Education: Dialogue between UNESCO's Committee on Conventions and Recommendations and the Chairperson of the United Nations Committee on Economic, Social and Cultural Rights, held at UNESCO on 21 May 2001.

[33] CESCR, General Comment No. 13 (Twenty-First Session, 1999) [UN Doc. E/2000/22] The right to education (art. 13 ICESCR) [*Compilation*, 2004, pp. 71–86].

[34] See 12.3.1.2.3. *infra.*

[35] On art. 23 ICESCR, see Alston, 1979, pp. 114 *et seqq.*

content to article 13 ICESCR.[36] It has been held that thanks to UNESCO's codification effort, the right to education today is one of the most precisely defined and efficiently protected economic, social and cultural rights.[37]

UNESCO's General Conference has adopted the following legal instruments which have a bearing on the right to education:[38]

Conventions:

- *Convention against Discrimination in Education* (1960)
- *Protocol Instituting a Conciliation and Good Offices Commission to be responsible for Seeking a Settlement of any Disputes which may arise between States Parties to the Convention against Discrimination in Education* (1962)
- *Convention on Technical and Vocational Education* (1989)[39]

Recommendations:

- *Recommendation against Discrimination in Education* (1960)
- *Recommendation concerning the Status of Teachers* (1966)
- *Recommendation concerning Education for International Understanding, Co-operation and Peace and Education relating to Human Rights and Fundamental Freedoms* (1974)
- *Recommendation on the Development of Adult Education* (1976)
- *Recommendation concerning the Status of Higher-Education Teaching Personnel* (1997)
- *Revised Recommendation concerning Technical and Vocational Education* (2001)[40]

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[36] The view that UNESCO's instruments on education serve to elaborate on art. 13 ICESCR is held by Alston, 1979, pp. 114 *et seq*. See also Nartowski, 1974, pp. 298 *et seq*., Marks, 1977, p. 42 and Daudet and Singh, 2001, pp. 13–15. Of the Specialised Agencies, the most notable codification effort has been made by the ILO in giving content to the right to work (art. 6 ICESCR) and the right to just and favourable conditions of work (art. 7 ICESCR). The World Health Organisation (WHO) and the Food and Agriculture Organisation of the United Nations (FAO) have, so far, not been active in the normative field.

[37] See Nartowski, 1974, p. 290.

[38] See also Hodgson, 1998, pp. 27–28.

[39] See also the following UNESCO conventions: the *Agreement for Facilitating the International Circulation of Visual and Auditory Materials of an Educational, Scientific and Cultural Character* (1948), the *Agreement on the Importation of Educational, Scientific and Cultural Materials* (1950) and the *Protocol to the Agreement on the Importation of Educational, Scientific and Cultural Materials* (1976). There further exist a number of UNESCO conventions which regulate the recognition of studies, diplomas and degrees in higher education. Conventions have been concluded for Latin America and the Caribbean (1974), Arab and European States bordering on the Mediterranean (1976), Arab States (1978), States belonging to the European Region (1979), African States (1981), Asia and the Pacific (1983) and the European Region (1997).

[40] See also the *Revised Recommendation concerning the International Standardisation of Educational Statistics* (1978). See further the *Recommendation on the Recognition of Studies and Qualifications in Higher Education* (1993).

Declarations:

- *Declaration on Eradication of Illiteracy in the United Nations Development Decade* (1964)
- *Declaration of Guiding Principles on the Use of Satellite Broadcasting for the Free Flow of Information, the Spread of Education and Greater Cultural Exchange* (1972)
- *Declaration on Fundamental Principles concerning the Contribution of the Mass Media to Strengthening Peace and International Understanding, to the Promotion of Human Rights and to Countering Racialism, Apartheid and Incitement to War* (1978)
- *Declaration on Race and Racial Prejudice* (1978)
- *International Charter of Physical Education and Sport* (1978)[41]

Conventions adopted by UNESCO create legal obligations for member states which have ratified them. Recommendations are not legally binding. It would be wrong, however, to hold that recommendations have no legal effect at all. Recommendations bind as soft-law. By reason of their adoption by the General Conference, they often represent an international consensus on the subject matter they deal with. Daudet and Singh state in this regard that "[a]lthough not legally binding, [recommendations] have a normative character in their intent and effects and the States concerned regard them as political or moral commitments".[42]

UNESCO member states have two distinct legal obligations with regard to conventions and recommendations adopted by the General Conference. These are the submission obligation and the reporting obligation. The *reporting obligation* is dealt with in the next section.[43] Concerning the *submission obligation*, article IV(4) UNESCO Constitution obliges member states to submit conventions and recommendations to their competent national authorities within one year after close of the session of the General Conference at which they were adopted. This provision requires member states to lay the said instruments before (customarily) the national legislature within the time stipulated, so that it may decide whether or not to ratify conventions, to enable it to transpose ratified conventions into national law, and to allow it to take cognisance of the provisions of unratified conventions and of recommendations.

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[41] See also the *Declaration of the Principles of International Cultural Co-operation* (1966).

[42] Daudet and Singh, 2001, p. 45. At pp. 42–48, Daudet and Singh explain that the legal effect of each recommendation needs to be determined separately and that various factors, such as the voting conditions and the terms employed, are to be considered in this respect. Lonbay, 1988, p. 405, note 143, says of recommendations that they "[are] 'binding' on all the Member States of UNESCO . . .". Coomans, 1992, p. 92 considers recommendations as legally not binding. This is also the view of Hodgson, 1998, p. 47 and p. 50. Gebert, 1996, p. 72 argues that members of UNESCO must obey recommendations, also without having expressed their will in this regard, by virtue of their membership of UNESCO.

[43] See 6.2.1.4.1. *infra.*

2.1.4. *The Monitoring of International Educational Standards by UNESCO*

The monitoring of international educational standards is entrusted to the Committee on Conventions and Recommendations.[44] The Committee has been set up as a permanent organ of the Executive Board.[45] At present (2004–2005), it has thirty members, the Committee being composed of governmental representatives. The mandate of the Committee is, firstly, to consider all questions entrusted to the Executive Board by the General Conference concerning the implementation of UNESCO's standard-setting instruments, including the consideration of state reports on the implementation of conventions and recommendations and, secondly, to examine communications relating to cases and questions concerning the exercise of human rights in UNESCO's fields of competence.[46] Both UNESCO's system of monitoring implementation of standard-setting instruments, which, generally, takes the form of consultations based on state reports, and its complaints procedure will now be discussed. The latter procedure will be described in some detail, since it is the only procedure at the international level in terms of which individual complaints concerning any aspect of the right to education may be examined by an international body.

2.1.4.1. *Consultations based on state reports*

A general state reporting obligation is laid down in article VIII UNESCO Constitution. Member states are instructed to submit reports on the action taken with regard to conventions and recommendations, at such times and in such manner as is determined by the General Conference.[47] Article IV(6) goes on to direct the General Conference to receive and consider the reports or, if it so decides, analytical summaries of the reports. In terms of the Rules of Procedure concerning recommendations to Member States and international conventions, "[t]he General Conference shall entrust the examination of the reports on such conventions and recommendations received from Member States to the Executive Board".[48] In practice, the consideration of state reports is undertaken by the Committee on Conventions and Recommendations.[49]

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[44] For more information on the Committee on Conventions and Recommendations, see *The Executive Board of UNESCO*, twelfth edition, Paris: UNESCO, 2004, pp. 60–77.

[45] For information on the Committee's historical development, see *ibidem* at pp. 60–61.

[46] The terms of reference of the Committee are laid down in 98 EX/Decision 9.6 (II) read with 104 EX/Decision 3.3.

[47] See also art. 17(1), Part VI, Rules of Procedure concerning recommendations to Member States and international conventions (32 C/Resolution 77 of 15 October 2003).

[48] Art. 18(1), Part VI, Rules of Procedure concerning recommendations to Member States and international conventions (32 C/Resolution 77 of 15 October 2003).

[49] See note 44 *supra*.

Supervision may generally be stated to take the form of consultations based on state reports.[50] At more or less regular intervals, the General Conference initiates the consultation procedure with regard to the one or other convention or recommendation. A questionnaire is then sent to member states which enquires on the state of realisation of the said instrument in the member states. Member states are called upon to reply to the questionnaire by submitting a report, setting out their response. The Secretariat prepares executive summaries and usually also a synthesis report of the state reports. The documents prepared by the Secretariat are then examined by the Committee on Conventions and Recommendations. On conclusion of its examination, the Committee embodies its comments on how certain provisions of the instrument should be interpreted, the extent to which the instrument has been implemented, and what can be done to render the further implementation of the instrument more effective, in a report transmitted to the Executive Board. The Executive Board attaches its comments and transmits the report to the General Conference. The General Conference, finally, embodies its comments in a general report or a resolution, which is made available to member states, National Commissions and the UN.[51]

2.1.4.2. *UNESCO's complaints procedure*

The Committee on Conventions and Recommendations is also competent to examine "communications", the latest procedure dating from 1978,[52] submitted by persons, groups of persons or NGOs,[53] concerning alleged

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[50] On the legal framework for monitoring implementation of UNESCO's standard-setting instruments, monitoring problems, proposals and options for changes to the monitoring system, and changes subsequently effected in this regard, see the document entitled "Examination of the methods of work of the Committee on Conventions and Recommendations, and report of the Committee thereon" (2004) (UNESCO Doc. 170 EX/15), particularly Annexes I to III.

[51] Art. 18(2), Part VI, Rules of Procedure concerning recommendations to Member States and international conventions (32 C/Resolution 77 of 15 October 2003) states, "The Executive Board shall transmit to the General Conference the reports or, if so decided by the General Conference, the analytical summaries thereof, together with its observations or comments and any that the Director-General may make. They shall be examined by the competent subsidiary organs prior to their consideration in plenary meeting".

[52] 104 EX/Decision 3.3 (1978)—"Study of the procedures which should be followed in the examination of cases and questions which might be submitted to UNESCO concerning the exercise of human rights in the spheres of its competence, in order to make its action more effective: Report of the Working Party of the Executive Board" (104 EX/3).

[53] Para. 14(a)(ii) UNESCO Doc. 104 EX/Decision 3.3. The person or group of persons, submitting a communication, must, on a reasonable presumption, be a victim/victims of an alleged violation of human rights. The communication may, however, also be submitted by a person, group of persons or NGO having reliable knowledge of those violations. In this case, a connection between the person, group of persons or NGO and the alleged victim need not be demonstrated.

violations of human rights in the fields of competence of UNESCO, namely, education, science, culture and information.[54] The Committee may, therefore, deal with communications alleging a violation of the right to education as protected by international human rights law, for example, as laid down in article 13 ICESCR.[55]

Once UNESCO receives a communication,[56] the Director-General completes four steps: Firstly, he acknowledges receipt of the communication and informs its author of the conditions of admissibility. Secondly, he ensures that the author has no objection to bringing the communication and the author's name before the Committee. Thirdly, once the author has given his permission, he sends the communication to the government concerned and informs it that the Committee will examine the communication together with any reply the government wishes to make.[57] Fourthly, he sends the communication and the reply, if any, of the government concerned to the Committee with any additional information from the author.[58]

The Committee considers communications in private session.[59] Firstly, it decides on *the admissibility* of the communication. There are ten conditions governing admissibility.[60] Amongst others, the communication must not be anonymous,[61] it must not be manifestly ill-founded and must appear to contain relevant evidence,[62] it must be neither offensive nor an abuse of the right to submit communications,[63] it must be submitted within a reasonable time-limit,[64] and it must indicate whether an attempt has been made to exhaust available domestic remedies.[65] The Director-General must notify the author of the communication and the government concerned of

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[54] Para. 14(a)(iii) UNESCO Doc. 104 EX/Decision 3.3.

[55] For particulars on the complaints procedure, see Marks, 1977, pp. 60 *et seqq*., Saba, 1978, pp. 496 *et seqq*., Bastid, 1983, pp. 45 *et seqq*., Partsch, 1990, pp. 482 *et seqq*. and Weissbrodt and Farley, 1994, pp. 391–414. See also the document entitled "Examination of the communications transmitted to the Committee on Conventions and Recommendations" (2004) (UNESCO Doc. 169 EX/CR/2). For a comparison of UNESCO's complaints procedure with those of the UN human rights bodies, see UNESCO Doc. 166 EX/23 (2003).

[56] On the treatment of communications by UNESCO, see UNESCO Doc. 169 EX/CR/2 (2004), paras. 11–36.

[57] At the 156th session of the Executive Board, it was decided that the government must submit its reply within three months, failing which the Committee is to proceed examining the admissibility of the communication.

[58] The four steps are laid down in para. 14(b)(i)–(iv) UNESCO Doc. 104 EX/Decision 3.3.

[59] Para. 14(c) UNESCO Doc. 104 EX/Decision 3.3.

[60] Para. 14(a) UNESCO Doc. 104 EX/Decision 3.3.

[61] Para. 14(a)(i) UNESCO Doc. 104 EX/Decision 3.3.

[62] Para. 14(a)(v) UNESCO Doc. 104 EX/Decision 3.3.

[63] Para. 14(a)(vi) UNESCO Doc. 104 EX/Decision 3.3.

[64] Para. 14(a)(viii) UNESCO Doc. 104 EX/Decision 3.3.

[65] Para. 14(a)(ix) UNESCO Doc. 104 EX/Decision 3.3. It should be noted that it is not a requirement that domestic remedies have *actually* been exhausted.

the Committee's decision on admissibility.[66] Secondly, if a communication has been declared admissible, the Committee examines *the merits* of the communication. If it appears to the Committee upon examination of the merits that a communication does not warrant further action, it must be dismissed.[67] With regard to communications which warrant further action, the Committee must attempt to bring about a friendly solution of the problem which promotes the human rights falling within UNESCO's fields of competence.[68] The Committee thus "[does] not play the role of an international judicial body". Instead, it seeks to resolve the matter in a spirit of international co-operation, conciliation and mutual understanding.[69] UNESCO has recently remarked as follows on its approach in dealing with communications:

> While [other complaints procedures] seem most often to take a conflictual and accusatory form, the UNESCO procedure . . . has from the very beginning been deliberately applied exclusively with a view to seeking a solution with the State concerned. For this reason, everything has always been done to avoid reaching the conclusion that a State has violated human rights. Such a conclusion would in fact mean a deadlock, preventing the continued search for a solution.[70]

It should be noted that representatives of the governments concerned may attend meetings of the Committee in order to provide additional information or to answer questions on either admissibility or the merits of the communication,[71] whereas the authors of communications are excluded.[72] The Committee may avail itself of any relevant information at the disposal of the Director-General.[73] It may further keep a communication on its agenda while seeking additional information necessary for the disposition of the matter.[74] On conclusion of the examination of a communication,

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[66] Para. 14(i) UNESCO Doc. 104 EX/Decision 3.3.
[67] Para. 14(j) UNESCO Doc. 104 EX/Decision 3.3.
[68] Para. 14(k) UNESCO Doc. 104 EX/Decision 3.3.
[69] This is expressly stated in para. 7 UNESCO Doc. 104 EX/Decision 3.3. Methods to achieve a friendly settlement are, for example, consultations with the government of the state against which the communication has been brought, the offering of good offices by prominent persons, and humanitarian endeavours by the Director-General. See UNESCO Doc. 120 EX/17 (1984), para. 39. The Director-General's right of intercession, vested in him by the General-Conference, personally to make humanitarian representations on behalf of persons who have allegedly been victims of human rights violations in UNESCO's fields of competence, is specifically recognised in paras. 8–9 UNESCO Doc. 104 EX/Decision 3.3.
[70] UNESCO Doc. 169 EX/CR/2 (2004), para. 39.
[71] Para. 14(e) UNESCO Doc. 104 EX/Decision 3.3.
[72] This clearly is contrary to the principle of equality of arms. See Weissbrodt and Farley, 1994, p. 404.
[73] Para. 14(f) UNESCO Doc. 104 EX/Decision 3.3.
[74] Para. 14(h) UNESCO Doc. 104 EX/Decision 3.3.

the Committee prepares a confidential report, containing its decisions and recommendations it wishes to make. If a friendly solution has not been reached, the Committee must state this in the report. The report is submitted to the Executive Board.[75] The Board, also meeting in private, customarily adopts the Committee's report.[76] Finally, the author of the communication and the government concerned are informed of the Committee's decisions. Its decisions are final.

If information at UNESCO's disposal indicates the existence of a series of violations of human rights, the question arises whether a communication constitutes a "question" "of massive, systematic or flagrant violations of human rights which result either from a policy contrary to human rights applied *de iure* or *de facto* by a State or from an accumulation of individual cases forming a consistent pattern".[77] The Committee only decides this after it has unsuccessfully attempted to bring about a friendly solution. If it decides that the communication constitutes a question, the communication is transmitted to the Executive Board. The Executive Board and the General Conference are then called upon to consider the question in public meetings.[78]

The Committee works in the strictest confidentiality. UNESCO considers this to be necessary out of a concern for efficiency in the search for an amicable solution. UNESCO has recently stated:

> [W]hat is perhaps the overriding characteristic of the UNESCO procedure is the emphasis, or indeed the insistence, on its strictly confidential nature, even after cases have been settled. No publicity has ever been given to the successes achieved through the UNESCO procedure, in order to sustain the confidence of the State concerned and secure its co-operation. The desire for confidentiality has even been taken to the point of declaring inadmissible those communications whose confidentiality had clearly been breached by their authors.[79]

As a result of the confidential nature of the procedure, little is known about it. In an information document of the Committee on Conventions and Recommendations of 19 March 2004, it is stated that the Committee has examined 508 communications between 1978 and September 2003, of

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[75] Para. 15 UNESCO Doc. 104 EX/Decision 3.3.

[76] It may, however, decide to take further action—for example, to send a representative to the country concerned to hold discussions on a case with the government. See para. 16 UNESCO Doc. 104 EX/Decision 3.3.

[77] Para. 10(b) UNESCO Doc. 104 EX/Decision 3.3. "Questions" are thus distinguished from "cases", provided for in para. 10(a) UNESCO Doc. 104 EX/Decision 3.3.

[78] Paras. 17–18 UNESCO Doc. 104 EX/Decision 3.3. To date, no use has been made of the procedure, whose effect would be to remove the communication from the jurisdiction of the Committee.

[79] UNESCO Doc. 169 EX/CR/2 (2004), para. 40.

which 315 were settled.[80] In the past, the Committee has dealt with a number of cases concerning various aspects of the right to education and discrimination in education. The cases concerned *inter alia* the awarding of diplomas, the refusal of study grants, the state's responsibility regarding private educational institutions, the expulsion of students, the right to permanent education, the recognition of degrees and diplomas, and the provision of education to the children of Roma.[81] Given the confidential nature of the complaints procedure, it is impossible to establish how the right to education has been interpreted by the Committee and how it may evolve.[82]

It has been opined that UNESCO's communication procedure may in certain politically sensitive cases yield a satisfactory solution.[83] All the same, attention has been drawn to the weaknesses of the procedure. Weissbrodt and Farley have critically analysed the handling and outcome of the sixty-four cases presented to the Committee between 1980 and 1991.[84] The authors criticise, for example, that there is no clear distinction between the consideration of the admissibility of a communication and the examination of its merits:

> [I]n practice the Committee has mingled the admissibility phase and the later "friendly solution" stage. The Committee's flexible mandate to seek friendly solutions has intruded into the admissibility phase of the procedure. This lack of distinction has caused the unwarranted rejection of cases and, more commonly, lengthy delays in the consideration of cases.[85]

Instead, the Committee should decide the question of admissibility in a quasi-judicial manner, thereby placing cases meriting further consideration firmly on the Committee's agenda.[86] The authors further argue that the complaints procedure "[has] not been implemented appropriately because the UNESCO process has not been subjected to the glare of public pressure, and because it has been quite isolated from more progressive devel-

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[80] *Ibidem* at p. 9.
[81] UNESCO Doc. 120 EX/17 (1984), paras. 41–50.
[82] See Lonbay, 1988, p. 433.
[83] See Coomans, 1992, p. 192. Weissbrodt and Farley, 1994, p. 397 also identify the following positive features of the communication procedure: 1. wide access to individuals, groups of individuals and NGOs, 2. the ability of NGOs to complain on behalf of victims, 3. the separate handling of each case throughout the procedure rather than merging cases into a "situation", as occurs in the case of the "1503 procedure" of ECOSOC (on the latter procedure, see note 34 in Chapter 3), 4. the consideration of individual "cases" of human rights violations as well as "questions" of mass and flagrant violations, 5. the subjection of countries to the procedure that have not ratified human rights treaties and 6. the Committee's ability to use other sources of information when considering cases, including the power of the Executive Board to appoint fact-finding missions.
[84] See Weissbrodt and Farley, 1994.
[85] *Ibidem* at p. 398.
[86] *Ibidem* at pp. 395–396 and p. 412.

opments in other international institutions".[87] They consider the procedure's confidential nature to be problematic. In their view, the procedure has been shrouded in such secrecy, that only very few people have sought relief.[88] The procedure also lacks accountability to the world community, as the results and possible follow-up in a specific case remain unknown. The authors proceed to suggest that the Committee should systematically make information available about the results achieved under the complaints procedure, so that its effectiveness can be evaluated more fully.[89] When the complaints procedure was developed in 1978, many states disputed the authority of UNESCO to address human rights violations. Human rights were considered to be a matter of essentially domestic concern. States were prepared to agree to the procedure only if it provided for confidentiality in the settlement of disputes.[90] This outdated view of human rights unjustifiably continues to permeate UNESCO's complaints procedure. Human rights law has evolved since 1978. At the beginning of the twenty-first century, human rights can no longer be regarded to be a matter which falls essentially within the domestic jurisdiction of states. This point is trite and need not be argued any further. A final point of criticism relates to the fact that the Committee is too political, as it is composed of governmental representatives. To improve the Committee's effectiveness, its size should be reduced from thirty to about ten members. These should be experts acting in their individual capacity.

2.2. *The Legal Instruments on Education Adopted by UNESCO and Their Supervision*[91]

The conventions and recommendations cited in section 6.2.1.3. above will now shortly be introduced. As the available space is limited, the emphasis

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[87] *Ibidem* at pp. 397–398.

[88] *Ibidem* at p. 392. Lonbay, 1988, p. 427—duly bearing in mind the date of the statement—holds that "[t]he fact that UNESCO receives less than 150 complaints a year, compared with the thousands received by other UN bodies attests to the 'success' of [the secrecy policy]. One might legitimately wonder how many complaints it might receive should people know that there was a possibility of some redress".

[89] Weissbrodt and Farley, 1994, p. 413.

[90] See Lonbay, 1988, pp. 423–424 who refers to the case of Chile, which, in 1975, had been publicly called to account in regard to sixteen complaints, alleging, *inter alia*, the sacking of teachers by the Pinochet government, censorship of curriculum and repression in universities. Chile bitterly complained that UNESCO was acting beyond its juridical capacity. Lonbay argues that "[p]ossibly states realised that what had been meted out to Chile might in turn be meted out to them" and that states thus insisted on a confidential complaints procedure.

[91] For an analysis of UNESCO's legal instruments on education, see Daudet, Y. and K. Singh, *The Right to Education: An Analysis of UNESCO's Standard-Setting Instruments*, Paris: UNESCO, 2001.

will be on the Convention against Discrimination in Education. The discussion of the other instruments must be rather brief.

2.2.1. *The Convention, and the Recommendation against Discrimination in Education*[92]

2.2.1.1. *Background*

The idea to adopt a convention to fight discrimination in education was proposed by Charles Ammoun, a former Special Rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, in his report, entitled *Study of Discrimination in Education* of 1957, which remains topical today, almost fifty years later.[93] On the basis of reports of UN member states, the UN Specialised Agencies and various NGOs, Ammoun had examined the then existing discrimination in education. He found such discrimination to be prevalent and concluded that an international convention on the subject would be the best way to counter discrimination. The idea was well received and prompted the Sub-Commission to grant to UNESCO the mandate to work out and adopt a convention on the topic. The preparation of the convention commenced in 1958 and was completed two years later when the General Conference adopted the *Convention against Discrimination in Education* (CDE) on 14 December 1960.[94] The provisions of the CDE were substantially influenced by the draft text of what is now article 13 ICESCR. The preparatory work on article 13 in its current form had already been concluded in 1957 and the substance of the article was not altered until the adoption of the ICESCR by the UN General Assembly in 1966. The guarantees of article 13, which themselves bear the handwriting of UNESCO, thus served as example for the CDE.

At the time of adopting the Convention, the General Conference also adopted a *Recommendation against Discrimination in Education*. The Recommendation was adopted to accommodate the concerns expressed by various federal states that they lacked the competence to ratify a convention which covered a matter within the competence of their constituent states or provinces. Countries, such as Switzerland, have not ratified the CDE but

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[92] The texts of both instruments are available at www.unesco.org.

[93] See Ammoun, C., *Study of Discrimination in Education* (UN Doc. E/CN.4/Sub.2/181/Rev.1), New York: UN, 1957 (UN Sales No. 57.XIV.3).

[94] Convention against Discrimination in Education (1960) 429 UNTS 93, entered into force on 22 May 1962. On the protection of the right to education by the CDE, see Saba, 1960, pp. 646 *et seqq*., Nartowski, 1974, pp. 289 *et seqq*., Marks, 1977, pp. 35 *et seqq*., Lonbay, 1988, pp. 360–405, Coomans, 1992, pp. 79–93, Gebert, 1996, pp. 70–78 and Hodgson, 1998, pp. 47–50 and pp. 89–92.

instead participate in the Recommendation. Sections I to V of the Recommendation correspond to articles 1 to 5 CDE, containing the material provisions of the Convention. The wording of the provisions is virtually identical but for the fact that the obligations of the Recommendation have been framed in weaker terms. The Recommendation generally states that member states "should" take the one or other measure. The Recommendation naturally has no implementation provisions corresponding to articles 6 to 19 CDE.[95] What is said in the discussion below on the CDE, applies *mutatis mutandis* to the Recommendation.

The importance of the CDE is not altogether borne out by its narrow description as a treaty "against discrimination in education". Although the CDE seeks to eliminate discrimination in education, the protection which it affords is of a much broader scope. The CDE factually constitutes a codification of the right to education.[96] It has been described as the core of an international educational code, consisting of the different UNESCO instruments on the right to education.[97]

As envisaged by article 23 ICESCR, the CDE constitutes international action for the achievement of article 13 ICESCR. The provisions of the CDE are connected with the protection against discrimination in education in terms of articles 2(2) and 3 read with article 13 ICESCR, with the guarantees of article 13(2) concerning primary, secondary, higher and fundamental education, with the rights of parents in terms of article 13(3) and with the right to found private schools in terms of article 13(4).[98]

The CDE shows advances when compared with the ICESCR. The following progressive elements may be noted:[99]

- Article 3(e) CDE directs states parties to give foreign nationals, who reside within their territory, the same access to education as that given to their own nationals.[100]
- Article 4 CDE instructs states parties to formulate, develop and apply a national education policy.

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[95] Exceptions are sects. VI and VII Recommendation, which correspond to arts. 6 and 7 CDE. Art. 6 CDE articulates the obligation of states parties in the application of the Convention to pay "the greatest attention" to recommendations subsequently adopted by UNESCO which define measures against discrimination in education and for the purpose of ensuring equality of opportunity and treatment in education. Art. 7 CDE formulates a state reporting obligation. On implementation, see 6.2.2.1.3. *infra.*

[96] See Gebert, 1996, p. 73.

[97] See Nartowski, 1974, pp. 305 *et seq.*

[98] See Gebert, 1996, pp. 77–78.

[99] The elements cited are mentioned by Gebert, 1996, p. 73.

[100] There is no comparable provision in the ICESCR.

- The CDE unequivocally obliges states parties to take measures not only against "active" but also against "static" discrimination.[101]
- Apart from a system of consultations based on state reports, there is also an interstate complaints procedure, which has been created in an optional protocol to the CDE.[102] The Convention's provisions may also form the basis of communications by individuals.[103]
- The reach of the CDE is wider, as all members of UNESCO participate at least in the Recommendation.

2.2.1.2. *The material provisions of the CDE*

2.2.1.2.1. *The CDE's purpose: Fighting "active" and "static" discrimination in education*

The purpose of the CDE is to contribute to the elimination and prevention of discrimination and the realisation of equality in education. The preamble of the CDE refers to "[proscribing] any form of discrimination in education [and promoting] equality of opportunity and treatment for all in education". The purpose of the CDE has been described in the following terms:

> In the first place, the Convention and the Recommendation translate into legal criteria conceptions shared by the members of the international community; for some these conceptions represent a minimum, long since acknowledged, and embodied in law and in practice in their national life; for others, they represent an ideal to be attained, or one to which they subscribe with varying degrees of enthusiasm or conviction. Then, once they have been adopted, these instruments become factors in a forward movement. They open up a new era in which ideals may become realities. They also set an international barrier against attempts at—or temptations to—backsliding.[104]

Although the CDE intends to be of universal application,[105] it does not envisage making education systems uniform. The preamble of the CDE speaks of "respecting the diversity of national educational systems". After all, article I(3) UNESCO Constitution states that "[w]ith a view to preserving the independence, integrity and *fruitful diversity of the cultures and educational systems* of the States Members of the Organisation, the Organisation

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[101] On the meaning of these terms, see 6.2.2.1.2.1. *infra*. In particular, art. 4 CDE obliges states parties to take measures against "static" discrimination.

[102] The interstate petition procedure is discussed at 6.2.2.1.3.1. *infra*.

[103] UNESCO's complaints procedure has been discussed at 6.2.1.4.2. *supra*.

[104] Juvigny, P., *The fight against discrimination: Towards equality in education*, Paris: UNESCO, 1963, p. 10.

[105] The stress on universality is also reflected by the fact that art. 9 CDE proscribes reservations to the treaty. Art. 9 states, "Reservations to this Convention shall not be permitted".

is prohibited from intervening in matters which are essentially within their domestic jurisdiction".[106]

The CDE's purpose is twofold: As has been stated, it seeks, firstly, to eliminate and prevent discrimination and, secondly, to realise equality in education. The Convention thus addresses what Ammoun, in his *Study of Discrimination in Education*,[107] calls "active" discrimination and "static" discrimination.[108] "Active" discrimination refers to discrimination which flows from state action, in pursuance of a policy evidently intended to originate, maintain or aggravate inequality.[109] "Static" discrimination, on the other hand, cannot really be ascribed to state action.[110] "Static" discrimination, which is much more widespread than "active" discrimination, refers to situations of inequality affecting vulnerable groups in society, which have manifested themselves in the fabric of a society, and which are the product of economic, social, cultural and geographical factors. Inequality is often also due to the state's inability to act as a result of a lack of financial and other resources.

Action against "active" discrimination essentially requires states to abrogate statutory provisions and administrative instructions which involve discrimination in education and to adopt legislation which prohibits discriminatory conduct in education. State obligations in this regard are of an immediate nature. Action against "static" discrimination requires more time. Here state obligations are of a progressive nature.[111] The adoption of legislation constitutes a necessary first step. States would, however, also have to take measures beyond the adoption of legislative measures. They would have to utilise all resources available to them in an effort to make education at the various levels generally available and accessible to all, so as, ultimately, to achieve equal opportunities and equal treatment for all in the enjoyment of the right to education. If the concept of equality is construed widely, states would also have to take affirmative action measures to advance the situation of vulnerable groups in society.[112]

The CDE in its preamble refers to the principle of non-discrimination and every person's right to education as proclaimed in articles 2 and 26 UDHR, respectively. These concepts form the basis of the material provisions

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[106] Author's italics.

[107] See Ammoun, 1957, pp. 4–5.

[108] "Static" discrimination may also be termed "passive" discrimination.

[109] "Active" discrimination is also described as "*de iure*" discrimination. This is so, because here the discriminatory conduct takes the form of introducing or not abolishing statutory provisions and administrative instructions which are discriminatory.

[110] "Static" discrimination is also described as "*de facto*" discrimination.

[111] Generally, on the nature of state obligations with regard to discrimination, see Craven, 1995, pp. 181–192.

[112] The issue of affirmative action measures is addressed more fully at 6.2.2.1.2.3., 6.2.2.1.2.4. and 9.3.2.3. *infra*.

of the Convention, contained in articles 1 to 5 CDE. Whereas articles 1, 2 and 3 are principally directed against "active" discrimination, articles 4 and 5 principally address "static" discrimination. Article 1 defines the terms "discrimination" and "education" for the purpose of the Convention. Article 2 mentions three situations which do not constitute discrimination as defined in article 1. Article 3 obliges states parties to take a number of specific steps in order to eliminate and prevent discrimination. Article 4 compels states parties to formulate, develop and apply a national educational policy aimed at promoting equality of opportunity and treatment in education. Article 5, finally, defines the aims of education, guarantees the rights of parents and protects certain educational rights of members of national minorities.

2.2.1.2.2. *Article 1 CDE*

Article 1 CDE states as follows:

> 1. For the purposes of this Convention, the term "discrimination" includes any distinction, exclusion, limitation or preference which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education and in particular:
>   (a) Of depriving any person or group of persons of access to education of any type or at any level;
>   (b) Of limiting any person or group of persons to education of an inferior standard;
>   (c) Subject to the provisions of Article 2 of this Convention, of establishing or maintaining separate educational systems or institutions for persons or groups of persons; or
>   (d) Of inflicting on any person or group of persons conditions which are incompatible with the dignity of man.
> 2. For the purposes of this Convention, the term "education" refers to all types and levels of education, and includes access to education, the standard and quality of education, and the conditions under which it is given.

Article 1(1) provides a broad definition of discrimination, in particular of "active" discrimination. The definition is based on the provisions of article 1 of the ILO's Convention concerning Discrimination in Respect of Employment and Occupation of 1958, which defines discrimination in similar terms.[113] Subsequently, article 1 of both instruments served as example for the definition of discrimination in article 1 CERD.[114]

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[113] Art. 1(1)(a) Convention concerning Discrimination in Respect of Employment and Occupation (1958) (ILO Convention No. 111) defines discrimination to include "any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation".

[114] Art. 1(1) CERD defines discrimination to mean "any distinction, exclusion, restriction

The following are the elements of the concept of discrimination in the CDE:

1. a difference in treatment,
2. which is based upon certain prohibited grounds,
3. the purpose or effect of which is
4. to nullify or impair equality,
5. in a selective field.[115]

In terms of article 1(1), *the difference in treatment* may occur in the form of a "distinction", "exclusion", "limitation" or "preference". The inclusion of the term "preference" suggests that the difference in treatment at issue may also be effected through the promotion of one group at the expense of others. This would, for example, be the case where study bursaries are available to members of a particular racial group only. The various forms of differential treatment all presume a standard of treatment from which the action complained of deviates.

Article 1(1) mentions nine *grounds of discrimination*, namely, race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth. The grounds of discrimination are drawn from article 2 UDHR. Unlike the UDHR, however, the CDE does not mention "or other status" as a further ground. When the CDE was drafted, it was considered that the said ground was too general in nature and might lead to differences in interpretation.[116] Accordingly, and unfortunately, the list of grounds appears to have been intended to be exhaustive.

Article 1(1) refers to distinctions which have *the purpose or effect* of nullifying or impairing equality. In the case of distinctions which have *the purpose* of impairing equality, the question is with what "state of mind" the act was performed. If the act was intended to discriminate, this is sufficient to establish responsibility. Intentional but ineffective discrimination is thus covered by virtue of the reference to the "purpose" of the distinction. In the case of distinctions which have *the effect* of impairing equality, "[t]he arbitrariness which is prohibited, means the purely objective fact and not the subjective condition of those concerned. Accordingly, the arbitrariness

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or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life".

[115] Generally, for a discussion of the subject of non-discrimination and equality in international law, see McKean, W., *Equality and Discrimination under International Law*, Oxford: Clarendon Press, 1983 and Eide, A. and T. Opsahl, *Equality and Non-discrimination*, Oslo: Norwegian Institute of Human Rights, 1990. See also Craven, 1995, pp. 161–181.

[116] See UN Doc. E/CN.4/Sub.2/210, Annex II, para. 27, Report of the Special Committee of Governmental Experts on the Preparation of a Draft International Convention and a Draft Recommendation on the Various Aspects of Discrimination in Education.

can be asserted without regard to . . . motive or purpose".[117] If an act actually impairs equality, this establishes responsibility. The emphasis on the "effect" of acts ensures that neutral measures will be considered discriminatory if, in fact, they negatively affect a person or group of persons. Unintentional but effective discrimination is also sometimes termed "indirect" discrimination.

The difference in treatment must further have the purpose or effect of *nullifying or impairing equality*. This means, in effect, that there must be no sufficient justification for the difference in treatment. In the *Mauritian Women's Case*, the Human Rights Committee, which supervises the ICCPR, found articles 2(1) and 3 of that Covenant (the counterparts of articles 2(2) and 3 ICESCR) to have been violated. The Committee made it clear that a distinction on the ground of sex was not in itself conclusive. The crucial factor was that no "sufficient justification" had been advanced for the distinction.[118] In the famous *Belgian Linguistic Case*, the European Court of Human Rights held that the principle of equality of treatment is violated "if the distinction has no objective and reasonable justification".[119] A distinction may be considered objective and reasonable if, firstly, it promotes a legitimate aim and if, secondly, there exists a relationship of proportionality between the distinction and the aim. The test of proportionality involves an examination as to whether the distinction concerned is a suitable, necessary and appropriate means to achieve the stated aim. All this needs to be adjudged in the light of the values applicable in a democratic society.

The differential treatment must, in addition, occur in *a selective field*, which, under article 1(1), is that of "education". Article 1(2) provides a wide definition of the term "education". "Education" includes not only all types and levels of education, but also the standard and quality of education and the conditions under which it is given. The fact that "education" refers to all types of education means that it also includes education offered by private educational institutions. The consequence hereof is that states parties to the CDE are also obliged to eliminate and prevent discrimination in private schools and to create equal chances for all to attend such schools.[120]

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[117] Judge Tanaka in the *South West Africa Cases (Second Phase)* (1966) ICJ Reports 6 at 293.

[118] *Shirin Aumeeruddy-Cziffra and 19 other Mauritian women v. Mauritius*, HRC, Communication No. 35/1978, 09/04/1981, UN Doc. CCPR/C/12/D/35/1978, at 9.2 (b).

[119] *Case "relating to certain aspects of the laws on the use of languages in education in Belgium" (Merits)*, Judgement of 23 July 1968, Publications of the European Court of Human Rights, Series A, Vol. 6, p. 34, para. 10.

[120] The issue of private discrimination is addressed more fully at 9.3.2.4. *infra*.

To the general part of article 1(1) is added a non-exhaustive reference to four particularly serious forms of discrimination in education, namely: firstly, depriving a person of access to education, secondly, limiting a person to education of a lower standard, thirdly, establishing separate educational institutions and, fourthly, inflicting on a person conditions which are incompatible with human dignity.

2.2.1.2.3. *Article 2 CDE*

Article 2 CDE mentions three situations which do not constitute discrimination as defined in article 1. Article 2 states:

> When permitted in a State, the following situations shall not be deemed to constitute discrimination, within the meaning of Article 1 of this Convention:
> (a) The establishment or maintenance of separate educational systems or institutions for pupils of the two sexes, if these systems or institutions offer equivalent access to education, provide a teaching staff with qualifications of the same standard as well as school premises and equipment of the same quality, and afford the opportunity to take the same or equivalent courses of study;
> (b) The establishment or maintenance, for religious or linguistic reasons, of separate educational systems or institutions offering an education which is in keeping with the wishes of the pupil's parents or legal guardians, if participation in such systems or attendance at such institutions is optional and if the education provided conforms to such standards as may be laid down or approved by the competent authorities, in particular for education of the same level;
> (c) The establishment or maintenance of private educational institutions, if the object of the institutions is not to secure the exclusion of any group but to provide educational facilities in addition to those provided by the public authorities, if the institutions are conducted in accordance with that object, and if the education provided conforms with such standards as may be laid down or approved by the competent authorities, in particular for education of the same level.

The clause "when permitted in a State" was added as a concession to states whose constitutional situation provides for a strict division of state and church and in which education must be neutral.[121] Article 2 does not by itself guarantee a right of access to single sex schools, schools based on a certain religion or language, or private schools. It only assures that, if a state party's education system envisages such schools, then, provided the conditions laid down in article 2 are fulfilled, their existence does not constitute discrimination. In effect, article 2 permits states parties, if they so

[121] The clause was added after Mexico had voiced its concern that art. 2(b) CDE would render its education system out of line with the CDE. The Mexican system disallowed clergy from holding teaching positions.

wish, to forbid single sex schools, schools based on a certain religion or language, or private schools.[122] The legal significance of the clause may be disputed though.[123] This becomes clear when regard is had to article 5(1)(b) and (c) CDE, to be discussed below. The former grants parents the right to choose for their children institutions other than those maintained by the public authorities, thereby implicitly recognising the right to establish private schools. The latter grants members of national minorities the right to maintain their own schools based on religious, linguistic or other criteria.

Article 2(a) provides that the establishment or maintenance of separate educational systems or institutions for students of the male or female sex does not constitute discrimination if a number of strict conditions is complied with. The establishment or maintenance of separate systems or institutions has been justified at the time of drafting the CDE by stating that

> the "separation" of schools for pupils of the two sexes is still too widespread in practice for the Convention to be able to affirm that, at the international level, it amounted to a proscribed form of discrimination.[124]

Article 2(a) should be compared with article 10 CEDAW, which has been discussed above.[125] Article 2(a) requires the different systems or institutions to offer *equivalent* access to education and it suffices if the systems/institutions afford the opportunity to take *equivalent* courses of study. In comparison, article 10 CEDAW does not use the word "equivalent" but refers to the *same* conditions for access to studies and to access to the *same* curricula.[126] The term "same" is much stricter than the term "equivalent". Article 2(a) does not prevent states parties from making technical professions accessible to men and caring professions to women only, as long as men and women can obtain "equivalent" qualifications! This is not possible under the CEDAW. The CDE, it may be concluded, does not address the problem of sex-role stereotyping in education. Article 10 CEDAW clearly represents an advance in this respect.[127]

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[122] See UN Doc. E/CN.4/Sub.2/210, Annex III, para. 9 (see note 116).

[123] See Coomans, 1992, p. 84.

[124] Juvigny, P., *The fight against discrimination: Towards equality in education*, Paris: UNESCO, 1963, p. 18.

[125] See 4.4.3. *supra*.

[126] Art. 10(a) CEDAW refers to "[t]he same conditions for career and vocational guidance, for access to studies and for the achievement of diplomas in educational establishments of all categories in rural as well as in urban areas; this equality shall be ensured in pre-school, general, technical, professional and higher technical education, as well as in all types of vocational training". Art. 10(b) refers to "[a]ccess to the same curricula, the same examinations, teaching staff with qualifications of the same standard and school premises and equipment of the same quality".

[127] See Coomans, 1992, p. 138.

Article 2(a) also holds the danger that many states parties may view its provisions as an excuse for not adopting a clear policy directed at integrating male and female students in schools. The article may lead to the maintenance of separate institutions which do not guarantee the same quality of education.[128]

Article 2(b) provides that the establishment or maintenance of separate educational systems or institutions based on religious or linguistic criteria does not constitute discrimination if, firstly, participation in such systems or attendance at such institutions is optional and, secondly, the education provided conforms to such standards as may be laid down or approved by the competent authorities. The provision caters for the educational needs of religious and linguistic minorities, and relates also to schools set up by the state.

The lawfulness of separate schools has always been a rather delicate issue.[129] There are those who are sceptical about the lawfulness of such schools. The Committee on the Elimination of Racial Discrimination has thus held in its 1983 annual report that establishing two systems of education may be understandable, but "might in time lead to the practice of discrimination among different strata of the population".[130] In 1954, the US Supreme Court, in the celebrated case of *Brown v. Board of Education of Topeka*,[131] had to decide whether laws requiring the segregation of white and "Negro" children in public schools violated the Equal Protection Clause of the US Constitution. The Court held that they did, and made the broad statement that ". . . in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal . . .".[132] At the same time, there are those who argue in favour of the lawfulness of separate schools. Holly Cullen has thus criticised the *Brown* decision,[133] asking whether integrated schools should be imposed on a minority who do not want them. He considers:

> [Separate schools] would not be a return to segregation, if the principles of guaranteed standards and optional attendance are applied. The evil of segregation is that it is imposed. To choose separate schools, and to control them, is evidence of an empowered, rather than powerless, minority.[134]

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[128] See *ibidem* at p. 85.

[129] For a brief discussion of the advantages and disadvantages of separate schools for minorities, see Tomaševski and Gustafsson, 2001, pp. 37–42.

[130] UN Doc. A/38/18, para. 197.

[131] 347 U.S. 483 (1954).

[132] *Ibidem* at 495.

[133] See Cullen, 1993, pp. 154–155.

[134] *Ibidem* at p. 155.

Similarly, Abdelfattah Amor, former Special Rapporteur of the Commission on Human Rights on Freedom of Religion or Belief, has held:

> [I]n certain circumstances—depending on the ethnic make-up of a society—[separate schools] may protect the rights of ethnic and religious minorities. The State, however, has obligations in this regard which are not confined to non-interference; it has a vital role in making sure that access to these schools is non-discriminatory and that the education they provide is based on tolerance. The State also has positive obligations as regards recognition of the qualifications granted by these schools and the supply of various services, which, where provided, should be made available on a non-discriminatory basis: financial assistance for teacher training, buildings maintenance and the payment of subsidies and grants to students.[135]

The views of Cullen and Amor should be supported. It will be noted that article 2(b) reflects these authors' views, including the safeguards they formulate.

Article 2(c) provides that the establishment or maintenance of private schools does not constitute discrimination if, firstly, their object is not to exclude any group but to provide educational facilities in addition to those provided by the state, secondly, the schools are conducted in accordance with that object and, thirdly, the education provided conforms to such standards as may be laid down or approved by the competent authorities. The provision is an expression of the classical freedom of education and protects the freedom to found private schools.

It may be asked whether, additionally to the three situations mentioned above, another situation, namely that of affirmative action measures in the form of special positive programmes in the educational field for the benefit of disadvantaged groups, may be considered to be implicitly excluded from the definition of discrimination in article 1. This should be answered in the affirmative. Within the meaning of article 1, "discrimination" means any distinction which has no objective and reasonable justification. Special positive programmes in the educational field in favour of disadvantaged groups, for example, vulnerable ethnic groups, girls and women, refugees, migrant workers, disabled persons, minorities or indigenous peoples promote a legitimate aim. Their purpose is not to nullify or impair equality of treatment in education. On the contrary, their purpose is to advance

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[135] Amor, 2001, para. 105 (UN Doc. A/CONF.189/PC.2/22). As pointed out by Amor at para. 21, in various countries, ethnic groups assert their right to be treated as a separate sector of a state's education system and claim that they are entitled to a distinct ethnic education. See, for example, the document of the UN Working Group on Indigenous Populations, containing information from an Aboriginal education leader: Jack Beetson, *Indigenous Peoples and Our Right to an Independent Indigenous Education System*, UN Doc. E/CN.4/Sub.2/AC.4/1998/2.

the position of the groups concerned and to attain greater equality of treatment in education.[136] Further, the stated programmes can usually not be said *not* to constitute suitable, necessary and appropriate means to achieve that aim. It is unfortunate that the CDE does not expressly provide clarity on the issue of the legitimacy of special positive programmes in the field of education.

2.2.1.2.4. *Article 3 CDE*

Article 3 CDE obliges states parties to take a number of specific steps in order to eliminate and prevent discrimination. Article 3 states:

> In order to eliminate and prevent discrimination within the meaning of this Convention, the States Parties thereto undertake:
> (a) To abrogate any statutory provisions and any administrative instructions and to discontinue any administrative practices which involve discrimination in education;
> (b) To ensure, by legislation where necessary, that there is no discrimination in the admission of pupils to educational institutions;
> (c) Not to allow any differences of treatment by the public authorities between nationals, except on the basis of merit or need, in the matter of school fees and the grant of scholarships or other forms of assistance to pupils and necessary permits and facilities for the pursuit of studies in foreign countries;
> (d) Not to allow, in any form of assistance granted by the public authorities to educational institutions, any restrictions or preference based solely on the ground that pupils belong to a particular group;
> (e) To give foreign nationals resident within their territory the same access to education as that given to their own nationals.

Article 3 is directed against "active" discrimination. It sets out precisely defined obligations which states parties must comply with immediately.[137] The obligations may be described as "obligations of conduct". They expect states parties to undertake a specific course of conduct.[138] The purpose of article 3 is to oblige states parties to take actual measures to fight discrimination in education.

Paragraph (a) instructs states parties to abolish laws and to discontinue administrative practices which involve discrimination in education.

Paragraph (b) directs states parties to ensure that there is no discrimination in the admission of students to educational institutions. It is not

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[136] See Coomans, 1992, p. 85.

[137] See UN Doc. E/CN.4/Sub.2/210, Annex II, para. 41 (see note 116).

[138] "Obligations of conduct" must be distinguished from "obligations of result". "Obligations of result" expect states to achieve a particular result through a course of conduct, the nature of and the means required for which are left to state discretion. See also the discussion at 9.2.1. *infra* in this regard.

altogether clear whether this provision is also relevant in as far as private schools are concerned, *i.e.* whether the state must also ensure that private schools comply with non-discrimination provisions. The *travaux préparatoires* are inconclusive on this point. It is submitted that the state's supervisory power must also extend to private schools, as otherwise the battle against discrimination can hardly be won.[139]

Paragraph (e) grants to foreign nationals, who reside within a state party, the same access to education as that given to nationals of that state party. The inclusion of this provision is important, as article 1(1) CDE does not mention "nationality" as a ground upon which discrimination is prohibited.[140] Its inclusion is further remarkable if it is considered that the ICESCR does not contain a comparable provision. It needs to be appreciated, though, that paragraph (e) concerns *access* to education only. This becomes clear when paragraph (c) is read. Paragraph (c) forbids states parties to allow any differences of treatment between nationals in the matter of school fees, the grant of scholarships and necessary permits for the pursuit of studies in foreign countries. Differences of treatment are permitted on the basis of merit or need only. By way of implication, differences of treatment between nationals and non-nationals with regard to these issues are not forbidden. The consideration was that it would not be realistic if states parties could not treat nationals and non-nationals differently concerning the award of financial and other facilities to students. Claims to such facilities, it was held, could be reserved to nationals only.

Paragraph (d) provides that states parties may not, where they grant assistance to educational institutions, allow any restrictions or preference "based solely on the ground that pupils belong to a particular group". Above, it has been stated that special positive measures in favour of factually disadvantaged groups in society do not constitute discrimination.[141] Such measures could include assistance to educational institutions serving the needs of vulnerable groups, not granted to other educational institutions. Paragraph (d), however, seems to rule out any such assistance. The question arises how paragraph (d) may be reconciled with the finding that special assistance to schools attended by members of vulnerable groups does not constitute discrimination. It could be argued that the granting of such assistance does not conflict with paragraph (d), seeing that it is not

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[139] See also 6.2.2.1.2.2. *supra*, where it has been argued that discrimination in education covers private discrimination.

[140] Art. 1(1) CDE does mention "national origin" as a ground upon which discrimination is prohibited. But, this does not refer to nationality in the legal sense but rather to membership of a national group.

[141] See 6.2.2.1.2.3. *supra*.

granted "*solely* on the ground that pupils belong to a particular group"[142] (which would amount to an arbitrary act), but also on the ground, to advance the position of the groups concerned and to achieve greater equality of treatment in education. If this argument is not convincing, reference may be made to the provisions of article 10 CDE. Article 10 states that the CDE may not prejudice the rights which individuals or groups may have in terms of other international agreements.[143] One such agreement to which states might be parties is the CERD. Article 2(2) CERD obliges states parties to take special measures to ensure the equal enjoyment of human rights by disadvantaged racial groups. This could include the granting of assistance to educational institutions serving the needs of disadvantaged racial groups on a preferential basis.[144]

2.2.1.2.5. *Article 4 CDE*

Article 4 CDE is directed against "static" discrimination. The article compels states parties to formulate, develop and apply a national educational policy aimed at promoting equality of opportunity and treatment in education. Article 4 states:

> The States Parties to this Convention undertake furthermore to formulate, develop and apply a national policy which, by methods appropriate to the circumstances and to national usage, will tend to promote equality of opportunity and of treatment in the matter of education and in particular:
> (a) To make primary education free and compulsory; make secondary education in its different forms generally available and accessible to all; make higher education equally accessible to all on the basis of individual capacity; assure compliance by all with the obligation to attend school prescribed by law;
> (b) To ensure that the standards of education are equivalent in all public educational institutions of the same level, and that the conditions relating to the quality of the education provided are also equivalent;
> (c) To encourage and intensify by appropriate methods the education of persons who have not received any primary education or who have not completed the entire primary education course and the continuation of their education on the basis of individual capacity;
> (d) To provide training for the teaching profession without discrimination.

Article 4 embodies the social aspect of the right to education.[145] States parties must take steps and devote resources in order to progressively realise

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[142] Author's italics.

[143] Art. 10 CDE states, "This Convention shall not have the effect of diminishing the rights which individuals or groups may enjoy by virtue of agreements concluded between two or more States, where such rights are not contrary to the letter or spirit of this Convention".

[144] Similarly, see art. 4(1) CEDAW.

[145] See Coomans, 1992, p. 88.

the right to education. In other words, states parties may, within reasonable bounds, take their time to fully implement the right to education. This is understandable, as the measures required to ensure equality of opportunity and treatment in education, and that education is generally available and accessible to all, are "complex and [involve] implementation of a broad range of economic and social policies necessitating expenditure over a period of time".[146] It is for this reason that article 4 in its *chapeau* refers to the obligation of states parties to take steps "by methods appropriate to the circumstances and to national usage".[147] The clause allows states parties to choose the means and methods they regard as appropriate in the national context to comply with their obligations. It may, therefore, be stated that article 4 contains "obligations of result". "Obligations of result" expect states to achieve a particular result through a course of conduct, the nature of and the means required for which are left to state discretion.[148]

It has been stated that the draft text of what is now article 13 ICESCR substantially influenced the provisions of the CDE. This is reflected in article 4(a) and (c) CDE concerning primary, secondary, higher and fundamental education. The wording of these paragraphs is similar to that of article 13(2)(a) to (d) ICESCR.[149] It should be noted though that whereas the ICESCR largely excludes the notion of progressiveness at the level of primary education, the CDE also makes it applicable at this level. Whereas article 13(2)(a) ICESCR provides that "[p]rimary education *shall be* compulsory and available free to all",[150] article 4(a) CDE describes the state's duty with regard to primary education by using the verb "to make", thereby introducing the idea of progressiveness. In view of the importance of primary education in giving individuals a chance in life, article 13(2)(a) ICESCR is preferable to article 4(a) CDE.

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[146] Van Bueren, 1995, p. 246.

[147] *Idem.*

[148] "Obligations of result" must be distinguished from "obligations of conduct". "Obligations of conduct" expect states to undertake a specific course of conduct. See also the discussion at 9.2.1. *infra* in this regard.

[149] Art. 4 CDE, however, also introduces new elements. Art. 4(a) obliges states parties to assure compliance by all with the obligation to attend school. Art. 4(b) instructs states parties to ensure equivalent standards in all public educational institutions of the same level. Art. 4(c) grants to children/youth/adults, subject to individual capacity, the right to continuing education. Art. 4(d), finally, directs states parties to provide training for the teaching profession without discrimination.

[150] Author's italics.

2.2.1.2.6. *Article 5 CDE*

Article 5 CDE, finally, defines the aims of education, guarantees the rights of parents and protects certain educational rights of members of national minorities. Article 5 states:

> 1. The States Parties to this Convention agree that:
> (a) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms; it shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace;
> (b) It is essential to respect the liberty of parents and, where applicable, of legal guardians, firstly to choose for their children institutions other than those maintained by the public authorities but conforming to such minimum educational standards as may be laid down or approved by the competent authorities and, secondly, to ensure in a manner consistent with the procedures followed in the State for the application of its legislation, the religious and moral education of the children in conformity with their own convictions; and no person or group of persons should be compelled to receive religious instruction inconsistent with his or their convictions;
> (c) It is essential to recognise the right of members of national minorities to carry on their own educational activities, including the maintenance of schools and, depending on the educational policy of each State, the use or the teaching of their own language, provided however:
> (i) That this right is not exercised in a manner which prevents the members of these minorities from understanding the culture and language of the community as a whole and from participating in its activities, or which prejudices national sovereignty;
> (ii) That the standard of education is not lower than the general standard laid down or approved by the competent authorities; and
> (iii) That attendance at such schools is optional.
> 2. The States Parties to this Convention undertake to take all necessary measures to ensure the application of the principles enunciated in paragraph 1 of this Article.

Article 5(1)(a) defines the aims of education in terms identical to article 26(2) UDHR. Like the latter article, it mentions:

1. the full development of the human personality;
2. the strengthening of respect for human rights and fundamental freedoms;
3. the promotion of understanding, tolerance and friendship among all nations, racial and religious groups; and
4. the furtherance of the activities of the UN for the maintenance of peace.[151]

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[151] See 4.3.1. *supra*. See also the comments made there on the aims of education set out in the UDHR.

Article 5(1)(b) guarantees the right of parents to choose for their children private schools which conform to such minimum educational standards as may be laid down or approved by the state. The provision implicitly recognises the right to establish and maintain private schools. After all, before children can be sent to private schools, such schools must first exist.

Article 5(1)(b) further guarantees the right of parents to ensure the religious and moral education of their children in conformity with their own convictions. When the CDE was drafted, it was considered that the term "religious and moral education does not relate to the education normally provided in schools, but merely to the religious and moral instruction which may be entirely or partly extra curricular".[152] In accordance with this construction, parents would be entitled to have their views respected as regards religious instruction, but not as regards the religious and moral aspects of other subjects offered as part of the curriculum. This interpretation is unnecessarily restrictive.[153] It reflects an undue fear of pluralism. The view that the state holds a monopoly concerning what is taught in schools is outdated and not at all in accordance with the principle of freedom of education cherished in pluralistic and democratic states.

Article 5(1)(b) obliges states parties to respect the right of parents to ensure "in a manner consistent with the procedures followed in the State for the application of its legislation" the religious and moral education of their children in conformity with their own convictions. The phrase in inverted commas was added to ensure that states parties could not be compelled to offer religious instruction in state schools.[154] It was a concession to Soviet and Eastern bloc states, which for ideological reasons did not offer religious education in public schools. The clause is vague, however, and states parties might rely thereon as a justification for not effecting any changes in their national education systems whatsoever.[155] It all too easily excuses states parties which merely pay lip service to the right of parents to have their religious and moral views respected as regards their children's education.

Article 5(1)(b) embodies the freedom aspect of the right to education. It is first and foremost of a negative nature. The state is forbidden to interfere in the sphere of education by denying parents the right to choose private schools for their children or by denying them the right to ensure the religious and moral education of their children in conformity with their own convictions. This does not mean, however, that states parties do not

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[152] See UN Doc. E/CN.4/Sub.2/210, Annex II, para. 51 (see note 116).
[153] See also Coomans, 1992, p. 90.
[154] See UN Doc. E/CN.4/Sub.2/210, Annex III, para. 19 (see note 116).
[155] See also Coomans, 1992, p. 90.

also bear positive obligations. The freedom aspect also entails positive duties. This is confirmed by the provisions of article 5(2), in terms of which states parties undertake to take all necessary measures to ensure the application of the principles enunciated in article 5(1). Often the measures will be in the nature of legislation adopted by states parties. Article 5(2) does not go so far, however, as to require of states parties the granting of financial and other resources to guarantee the exercise of the rights in article 5(1).[156] This is most unfortunate, indeed, as it implies that states parties are not required to subsidise private education. The consequence is that states parties may not directly abolish private education, but that they may do so with impunity indirectly through withholding funds from private schools.[157] More often than not, such funds make the exercise of the right to set up private schools possible in the first place.

Article 5(1)(c), finally, grants to members of national minorities certain rights in the sphere of education. Subject to specific limitations, they may maintain their own schools and use or teach their own language in these schools. The rights are available to members of *national* minorities only. The intention of the drafters of the CDE, in granting the rights to members of national minorities only, has been to exclude immigrants from the scope of protection of article 5(1)(c).[158] In terms of contemporary developments, this constitutes an undue restriction of the reach of the provision.[159]

At the time of drafting the CDE, it was proposed to impose on states parties the obligation to set up and operate minority schools.[160] The proposal did not find support, however.[161] Instead, it was provided that members of national minorities should have the right to establish and maintain their own (private) schools. There is no provision for state financing of such schools. As has been stated above, a duty of states parties to subsidise private education can also not be inferred from article 5(2). It is a serious shortcoming of the CDE that it does not oblige states parties to subsidise minority schools. Most minorities are too poor to finance their educational institutions all on their own. Without additional state funds, many minority schools will only be able to provide education of an inferior standard, compared with that provided in public schools. As has been stated by a commentator, "[t]he complete financing by the national minority of its own educational system may undermine the spirit of equality

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[156] See *ibidem* at p. 92.
[157] See Van Bueren, 1995, p. 348.
[158] See UN Doc. E/CN.4/Sub.2/210, Annex II, para. 52 (see note 116).
[159] See Hodgson, 1998, p. 91.
[160] In other words, it was proposed that there should be public schools serving the educational needs of minorities.
[161] See Coomans, 1992, p. 91.

which otherwise pervades the Convention . . .".[162] Note should be taken of article 5(2) of UNESCO's Declaration on Race and Racial Prejudice of 1978, which requires states to make "the resources of the educational system available to all groups of the population without racial restriction or discrimination".

Article 5(1)(c) grants to members of national minorities the right to use *or* to teach their language in their schools, "depending on the educational policy of each State". It has been stated on more than one occasion in this book[163] that the study *of and* instruction *in* the mother tongue—both, at least, up to the secondary school level—are essential, if children belonging to minorities are to acquire fluency in their mother tongue and if minority culture is to be effectively protected. Granting states parties a choice between allowing either the use or the teaching of minority languages in minority schools reflects an approach which is unduly deferential to state interests and not at all geared towards the effective protection of minority rights.[164]

As appears from the above, article 5(1)(c) is deficient in various respects. In effect, it would seem to achieve no more than the recognition of a formal right of members of national minorities to found and operate their own schools.[165] It has even been held that article 5(1)(c) envisages the assimilation of minorities. Amongst others, the argument has been based on the fact that the first condition to which minority educational rights have been subjected in article 5(1)(c)(i) demands *inter alia* that the rights are "not exercised in a manner which prevents the members of these minorities from understanding the culture and language of the community as a whole and from participating in its activities . . .".[166] Elsewhere, the requirement that members of minorities learn the "mainstream" culture and language has been considered "salutary".[167] Both views are correct in their own way. It ultimately depends on how states parties construe the stipulation, *i.e.* whether they regard it as an instruction to take measures aimed at preventing minorities from lapsing into ethnic fundamentalism, or whether they regard it as a *carte blanche* for forcing the "mainstream" culture on minorities to the detriment of their own culture. Furthermore, issue must be taken with that part of the first condition in article 5(1)(c)(i), which demands that

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[162] Hodgson, 1998, p. 91.

[163] See, for example, the comments made at 4.11.2. *supra* on art. 4(3) Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities.

[164] Hodgson, 1998, p. 91 considers the clause "depending on the educational policy of each State" to dilute the strength of art. 5(1)(c) CDE.

[165] See Coomans, 1992, pp. 91–92.

[166] See *ibidem* at p. 91.

[167] See Hodgson, 1998, p. 90.

minority educational rights may not prejudice national sovereignty. The stipulation reflects fear of pluralism and a desire of states to use schooling as a tool for nation-building.[168] It is so vague that states parties may, in fact, justify any type of action under it which denies minorities their educational rights.[169] The conditions in article 5(1)(c)(ii) and (iii), that the standard of education in minority schools must not be lower than the general standard laid down or approved by the competent authorities and that attendance at such schools must be optional, are meaningful and need not be commented on any further.

Reference has already been made to article 5(2), which obliges states parties "to undertake to take all necessary measures to ensure the application of the principles enunciated in Article 5(1)". Attention has been drawn to the limited scope of this provision.

2.2.1.3. *The supervision of the CDE*

Articles 6 to 19 CDE contain provisions on the implementation of the Convention. Particularly article 7, containing a state reporting obligation, is of interest here. Note should also be taken of articles 6 and 8. The former obliges states parties, in the application of the Convention, to pay "the greatest attention" to recommendations subsequently adopted by UNESCO, "defining the measures to be taken against the different forms of discrimination in education and for the purpose of ensuring equality of opportunity and treatment in education". The latter provides that any dispute between two or more states parties concerning the interpretation or application of the Convention, which is not settled by negotiation, must at the request of the parties to the dispute be referred, failing other means of settling the dispute, to the International Court of Justice for decision.

The implementation of the CDE is supervised at three levels. Firstly, its provisions may form the basis of communications by individuals under UNESCO's complaints procedure. It should be pointed out that the complaints procedure applies to the right to education, generally, as protected by international human rights law. Complaints may, therefore, just as well be based on, for example, article 13 ICESCR. The complaints procedure has been discussed above and will, therefore, not be dealt with again here.[170] Secondly, an interstate complaints procedure, in terms of which one state party can complain that another does not give effect to the provisions of the Convention, has been created in an optional protocol to the CDE.

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[168] See Lonbay, 1988, p. 404.

[169] Hodgson, 1998, p. 91 considers the reference to "prejudices national sovereignty" to be a product of outdated assumptions.

[170] See 6.2.1.4.2. *supra.*

Thirdly, the implementation of the CDE is supervised through periodic consultations with states parties, conducted on the basis of reports which states parties must submit. States not party to the CDE take part in consultations by virtue of their participation in the Recommendation against Discrimination in Education. The interstate complaints procedure and the system of consultations based on state reports will now be discussed.

2.2.1.3.1. *The interstate complaints procedure established under the Protocol Instituting a Conciliation and Good Offices Commission to be responsible for Seeking a Settlement of any Disputes which may arise between States Parties to the Convention against Discrimination in Education*

On 12 December 1962, the General Conference of UNESCO adopted the *Protocol Instituting a Conciliation and Good Offices Commission to be responsible for Seeking a Settlement of any Disputes which may arise between States Parties to the Convention against Discrimination in Education*.[171] Article 1 of the Protocol provides for the establishment under the auspices of UNESCO of a Conciliation and Good Offices Commission "to be responsible for seeking the amicable settlement of disputes between States Parties to the Convention against Discrimination in Education . . . concerning the application or interpretation of the Convention". The Commission consists of eleven members[172] who serve in a personal capacity.[173]

If a state party to the Protocol considers that another state party is not giving effect to a provision of the CDE, it may, by written communication, bring the matter to the attention of that state. The receiving state must, within three months after the receipt of the communication, afford the complaining state an explanation in writing concerning the matter, which should include references to procedures and remedies taken, pending or available in the matter.[174] If the matter is not settled to the satisfaction of both parties, by bilateral negotiations or otherwise, within six months after the receipt by the receiving state of the initial communication, either state may refer the matter to the Commission.[175] Also disputes between states parties to the CDE who are not, or not all, states parties to the Protocol may be submitted to the Commission, if the said states so agree.[176]

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[171] Protocol Instituting a Conciliation and Good Offices Commission to be responsible for Seeking a Settlement of any Disputes which may arise between States Parties to the Convention against Discrimination in Education (1962) 651 UNTS 362, entered into force on 24 October 1968. For particulars on the Protocol, see Marks, 1977, p. 58, Saba, 1978, pp. 492 *et seqq*. and Bastid, 1983, pp. 45 *et seqq*.

[172] Art. 2(1) Protocol.

[173] Art. 2(2) Protocol.

[174] Art. 12(1) Protocol.

[175] Art. 12(2) Protocol.

[176] Art. 13 Protocol.

The Commission will only deal with a matter after it has ascertained that all available domestic remedies have been exhausted in the case.[177] Once this has been established, the Commission must ascertain the facts and make available its good offices to the states concerned "with a view to an amicable solution of the matter on the basis of respect for the Convention".[178] If a solution is reached, the Commission must draw up a report in which it briefly sets out the facts and the solution reached. If a solution is not reached, the report must set out the facts and the recommendations made with a view to conciliation.[179] The report is sent to the states concerned and then communicated to the Director-General for publication.[180] It should be noted that the Commission may recommend to the Executive Board that the International Court of Justice be requested to give an advisory opinion on any legal question connected with a matter laid before the Commission.[181] The Commission must submit to the General Conference at each of its regular sessions a report on its activities.[182]

Ever since the Protocol entered into force in 1968, no dispute has been referred to the Commission established thereunder.[183] This prompted the Director-General of UNESCO, in a study submitted to the General Conference, to suggest that either the Protocol be terminated or suspended, or that certain changes be made to save costs incurred in servicing the Commission.[184] The Committee on Conventions and Recommendations, in a comment on the study, made clear that it disfavoured the first option and referred to the deterrent effect that the very existence of the Commission could have.[185] This also reflects the position of the General Conference's Legal Committee. The Committee has stated:

> The Committee was also of the opinion that the termination of a procedure whose purpose was to protect a human right would constitute a regrettable precedent, and that furthermore the absence of any disputes to settle did not justify the termination of the Commission, especially since its existence had an undoubted deterrent effect . . . For this reason it preferred to suggest to

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[177] Art. 14 Protocol.
[178] Art. 17(1) Protocol.
[179] Art. 17(3) Protocol.
[180] Art. 17(2) Protocol. Note should be taken of art. 25 Protocol, which provides that any state may, at any time, declare that it agrees, with respect to any other state assuming the same obligation, to refer to the International Court of Justice any dispute on which no amicable solution has been reached.
[181] Art. 18 Protocol.
[182] Art. 19 Protocol.
[183] See UNESCO Doc. 167 EX/17 (2003), para. 14.
[184] See *Study concerning problems and possible solutions regarding the Conciliation and Good Offices Commission to be responsible for seeking the settlement of any disputes which may arise between states parties to the Convention against Discrimination in Education* (1997) (UNESCO Doc. 29 C/52).
[185] See UNESCO Doc. 152 EX/54 (1997).

> the Contracting States that means of revitalising and developing that procedure should be sought.[186]

It is submitted that these views of the Legal Committee are correct. The Protocol is still in force.

2.2.1.3.2. *Consultations based on state reports*

The implementation of both the Convention, and the Recommendation against Discrimination in Education is supervised through periodic consultations, conducted on the basis of reports which states must submit.[187] The general state reporting obligation concerning conventions and recommendations laid down in article VIII UNESCO Constitution, referred to above,[188] is reinforced as regards the CDE in article 7 of the Convention and as regards the Recommendation in section VII of that instrument. Article 7/section VII obliges states to submit reports on dates and in a manner determined by the General Conference. The reports must "give information on the legislative and administrative provisions which they have adopted and other action which they have taken for the application of [the Convention/Recommendation], including that taken for the formulation and the development of the national policy defined in [article 4/section IV] as well as the results achieved and the obstacles encountered in the application of that policy". The reports are evaluated by the Committee on Conventions and Recommendations.[189] The Committee has been set up as a permanent organ of the Executive Board. At present (2004–2005), it has thirty members, the Committee being composed of governmental representatives. The procedure followed for consultations has been described above.[190]

So far, there have been six consultations on the Convention, and the Recommendation against Discrimination in Education. Consultation rounds take place every six years and may go on for six years. The Sixth Consultation on the Convention and Recommendation began in 1993 and ended in 1999.

In all rounds of consultation conducted so far, the rate of states submitting reports in response to the questionnaire has been rather low.[191] In

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[186] UNESCO Doc. 29 C/75 (29 C/LEG/5) (1997), paras. 6 and 7.

[187] For particulars on the system of consultations based on state reports in the context of the Convention, and the Recommendation against Discrimination in Education, see Saba, 1978, pp. 489 *et seqq.*, Lonbay, 1988, pp. 407–420, Coomans, 1992, pp. 215–220 and Gebert, 1996, pp. 75–76.

[188] See 6.2.1.4.1. *supra.*

[189] See 70 EX/Decision 5.2.1 and 71 EX/Decision 3.2.

[190] See 6.2.1.4.1. *supra.*

[191] See Lonbay, 1988, pp. 407–420 and Coomans, 1992, pp. 216–217.

the Sixth Consultation, only 56 reports were received, 30 reports on the Convention and 26 reports on the Recommendation. At the relevant time, UNESCO had some 180 members, of which more than 80 were states parties to the Convention. Eight responses were received from African states (1 on the Convention), 7 from Arab states (4 on the Convention), 9 from Asian and Pacific states (5 on the Convention), 24 from European states (16 on the Convention) and 8 from Latin American and Caribbean states (4 on the Convention).[192]

An assessment of the reports submitted by states in the course of the consultations conducted so far shows that the quality of reports has been very different. Some reports blandly assert that no discrimination in education exists in the state concerned. Others detail the *de iure* position of the state, omitting information on whether the state in practice complies with the provisions of the Convention or Recommendation. There are, however, also many reports which provide detailed descriptive and statistical data on the legal and factual situation as regards discrimination in education.[193]

The main reason for the low rate of states submitting reports and the poor quality of some of the reports is the following: Compiling a report of the nature envisaged requires the state to obtain information from various government authorities competent in the field of education. The co-operation of the authorities is necessary, if the effort of preparing the report is to be successful. In many states, especially developing ones, the institutional infrastructure to comply with the request either does not exist or is poorly developed. These states often lack the technical means and the financial resources needed to compile the report. Often there is no qualified personnel to carry out the task.[194] The Committee has therefore recommended on more than one occasion that UNESCO should send consultants to such states to help them plan implementation of the instruments and completion of the necessary reports.[195]

A good feature of the consultation process up to the Fifth Consultation has been the use of the questionnaire.[196] Questionnaires expected states to respond to specific, concrete questions.[197] This made it possible for states to provide detailed answers. The formulation of questions already contained indications which could help states to structure their answers. The questionnaire often mentioned factors which could constitute obstacles in

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[192] See UNESCO Doc. 156 EX/21 (1999), para. 7.
[193] See Lonbay, 1988, pp. 407–420 and Coomans, 1992, pp. 217–218.
[194] See Coomans, 1992, p. 217. See also UNESCO Doc. 164 EX/23 (2002), paras. 20–21.
[195] See Lonbay, 1988, pp. 412–413 and p. 215.
[196] See Coomans, 1992, p. 217.
[197] The Fifth Consultation's questionnaire had asked for well over 150 items of information.

the fight against discrimination in education. There were, however, changes in the arrangements with regard to the Sixth Consultation. Several member states had expressed concern over requests for information sent to them by UNESCO (and other UN bodies). They had argued that the number and volume of requests were growing unmanageable, and that requests did not always make their relevance or priority clear.[198] Consequently, it was decided that the questionnaire used in the Sixth Consultation should have a sharper focus.[199] Whereas previous consultations had attempted to cover all the main legal points of the Convention and Recommendation in a way that tried to address all population groups and education levels, it was considered that the Sixth Consultation should focus on the basic education of four particularly vulnerable population groups, namely, women and girls, persons belonging to minorities, refugees and indigenous peoples.[200] Member states were requested to provide concrete examples of general and specific measures, legislation and/or programmes elaborated and applied with a view to promoting equality of opportunity and treatment in basic education for each of the four population groups. The focus of the consultation on *basic education* must be understood in the light of the initiative for basic education for all (EFA), stemming from the World Conference on Education for All, held at Jomtien, Thailand from 5 to 9 March 1990.[201] Its focus on *disadvantaged groups in society* in turn must be understood in the light of the growing awareness in the 1990s of the needs of and barriers faced by disadvantaged population groups in the education system, notably the groups on which the consultation focused.[202] It was further decided to broaden the information base of the consultation, firstly, by requesting NGOs having category A consultative status with UNESCO and having as their main domain education to submit comments on the implementation of the Convention and Recommendation[203] and, secondly, by taking

[198] See "Report by the Director-General on the arrangements and timetable for the preparation of the report on the Sixth Consultation of member states on the implementation of the Convention and Recommendation against Discrimination in Education", UNESCO Doc. 27 C/38 (1993), para. 7.

[199] For the survey instrument for the Sixth Consultation, see UNESCO Doc. 156 EX/21 (1999), Appendix 1, which contains circular letter CL/3408, to which the survey instrument has been annexed.

[200] See 27 C/Resolution 1.9 of the General Conference.

[201] More will be said on the basic education for all (EFA) initiative at 7.3. *infra.*

[202] See, for example, the Vienna Programme of Action, adopted by the World Conference on Human Rights, held at Vienna, Austria from 14–25 June 1993, which addresses the human rights of women in paras. 36–44, of persons belonging to minorities in paras. 25–27 and of indigenous peoples in paras. 28–32.

[203] Out of 10 NGOs consulted, only 2 provided the requested comments. In view of the low response rate, it was eventually decided also to request NGOs having consultative and operational relations with UNESCO and having as their main domain education to sub-

account of relevant information drawn from national reports submitted by member states to the International Bureau of Education (IBE) on the occasion of the forty-fifth session of the International Conference on Education (ICE), held at Geneva, Switzerland in 1996.[204]

The tone of the reports of the Committee on Conventions and Recommendations is that they are part of a co-operative procedure which is not designed to put states in the dock, but instead to increase a state's understanding of the problems it faces in implementing the Convention or Recommendation and how to solve such problems.[205] The reports generally criticise that many states do not submit reports and that those that do, often submit reports of poor quality, not detailing both the *de iure* and *de facto* situation as regards discrimination in education, supported by descriptive and statistical information. They do not, however, mention the names of states which do not, at all or properly, comply with their reporting obligation. The reports further comment on practices which are contrary to the Convention/Recommendation in a neutral fashion rather than making it clear that they constitute violations of the right to education.[206] The Committee seems to carry the friendly, non-adversarial approach too far. The Committee should indicate which states do not comply with their reporting obligation and it should clarify which practice in which state violates the provisions of the Convention/Recommendation.

The reports generally comment that "active" discrimination in education in the form of discriminatory laws has largely been eradicated in member states.[207] They show, however, that "static" discrimination persists in the education systems of many states. The reasons for "static" discrimination are financial, socio-economic, socio-cultural and geographical in nature. Many states lack the financial resources required to establish and maintain an education system. There are not sufficient school buildings and

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mit comments. Out of 61 NGOs consulted, 5 provided the requested comments. See UNESCO Doc. 156 EX/21 (1999), paras. 4–7.

[204] See 27 C/Resolution 1.9 of the General Conference. The International Bureau of Education (IBE), founded in 1925, joined UNESCO in 1969 as an integral, yet autonomous, institution. Its main responsibility is to organise the sessions of the International Conference on Education (ICE), held every two years or so, as an international forum for dialogue on educational policy.

[205] The Committee's reports are contained in the following UNESCO documents: First Consultation, Doc. 15 C/11 (1968), Second Consultation, Doc. 17 C/15 (1972), Third Consultation, Doc. 21 C/27 (1980), Fourth Consultation, Doc. 23 C/72 (1985) and Fifth Consultation, Doc. 26 C/31 (1991). Concerning the Sixth Consultation, see "Examination of the reports and responses received in the Sixth Consultation of member states on the implementation of the Convention and Recommendation against Discrimination in Education", UNESCO Doc. 156 EX/21 (1999).

[206] See Lonbay, 1988, pp. 418–419.

[207] The discussion in this paragraph is broadly based on the observations of Coomans, 1992, pp. 218–220.

teaching materials. Often there are no qualified teachers. Where the educational facilities in a state cannot satisfy the educational needs of all, vulnerable groups are in practice the first to be excluded from access to schooling. A socio-economic reason for "static" discrimination is the poverty of large portions of the population in many countries, as a result of which many children are required to perform child labour, thus preventing them from attending school. Socio-cultural reasons are, for example, religious and cultural beliefs which prescribe that girls should not be educated but rather perform domestic chores. A geographical reason for "static" discrimination is that in some countries there exist isolated populations living in far-off areas where it is difficult to set up an educational infrastructure.

In general, the style followed in the Committee reports has not facilitated norm clarification to any considerable extent. A notable exception is the Committee's stance that positive discrimination in favour of underprivileged groups is in accord with the Convention and Recommendation.[208] The report of the Sixth Consultation goes a step further and recognises that special assistance and action are, in fact, required to ensure that all students from all disadvantaged population groups are able to maximise their learning outcomes.[209]

Altogether, although the consultation procedure—up to the Sixth Consultation—may be stated to have been premised on honest intentions, it clearly suffered from serious shortcomings. Julian Lonbay remarked as follows on the procedure:

> The state reporting system seems to have declined from the initial high aspirations expressed in the first Report of the [Committee] where true comparisons and evaluation by statistical methods and interrogation of states via the Director-General were expected, to the fourth consultation where the [Committee] was able to boast that more states had responded to the consultation but still many did not respond at all, many sent in useless reports, and none of the vague reports were followed up at all.[210]

Various aspects of the consultation procedure are problematic. The fact, for example, that the Committee on Conventions and Recommendations is composed of governmental representatives rather than of individual experts, makes it very political and negatively affects its authority.[211] The task of the Committee has further become very formal. Instead of examining in detail member states' reports themselves, it considers principally a synthesis report prepared by the Secretariat. The Committee also does not

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[208] See Lonbay, 1988, p. 417.
[209] See UNESCO Doc. 156 EX/21 (1999), para. 13.
[210] Lonbay, 1988, p. 418.
[211] See Coomans, 1992, p. 216.

benefit from participation by NGOs and civil society.[212] Finally, one may add that, so far, no use has been made of effective follow-up procedures.[213]

Based on its examination of member states' reports submitted with regard to the Sixth Consultation, the Committee on Conventions and Recommendations—aware of most of the above problems—thus proposed that the entire mechanism for monitoring the implementation of the Convention and Recommendation should be renovated and revitalised. Proposals were made to the effect that UNESCO should not only comment on state reports but also organise dialogue with individual member states, that it should consider a system of reports of the kind established by the UN treaties on human rights and that the reporting system should be improved by giving consideration to the criteria for evaluating reports and the possibilities for improving the accountability of governments.[214] The Sixth Consultation was concluded with the General Conference adopting 30 C/Resolution 15,[215] paragraph 12 thereof inviting the Director-General amongst others:

> to study, with a view to the seventh consultation and in co-operation with the United Nations, the possibility of creating a coherent mechanism for reporting on and monitoring the right to education as it is set down in various United Nations conventions on human rights, and to inform [the General Conference] at its 31st session of measures undertaken to this end.

As a first step in the direction of co-operation with the UN for "creating a coherent mechanism for reporting on and monitoring the right to education", a joint UNESCO/Committee on Economic, Social and Cultural Rights expert group on the right to education has been created. The role of the expert group is to discuss issues of common concern arising from the right to education, including the question of how to improve the implementation of the CDE, and, where pertinent, to formulate appropriate suggestions and recommendations. The expert group's mandate and composition and the outcome of its first meeting will be discussed in Chapter 12 below.[216]

UNESCO long since is aware of the shortcomings of the reporting system.[217] The Committee on Conventions and Recommendations thus recently observed that "the reports policy is not functioning satisfactorily" and that

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[212] See "Report by the Joint Expert Group UNESCO (CR)/ECOSOC (CESCR) on the monitoring of the right to education", UNESCO Doc. 167 EX/CR.2 (2003), para. 4.

[213] See Lonbay, 1988, p. 418.

[214] See "Sixth Consultation of member states on the implementation of the Convention and Recommendation against Discrimination in Education", UNESCO Doc. 30 C/29 (1999), para. 5.

[215] See "Sixth Consultation of member states on the implementation of the Convention and Recommendation against Discrimination in Education", 30 C/Resolution 15 of 17 November 1999.

[216] See 12.3.1.2.3. *infra.*

[217] See UNESCO Doc. 164 EX/23 (2002), paras. 15–16 and paras. 20–24.

it is "no doubt . . . desirable to rethink the reporting system".[218] The Executive Board, accordingly, and on the basis of proposals formulated by the Committee,[219] adopted 165 EX/Decision 6.2. The latter recommends to the General Conference, in paragraph 7, that, in order to rationalise the reporting procedures, it establish new procedures for reporting by member states. The General Conference, in consequence, adopted 32 C/Resolution 77,[220] revising Part VI of the Rules of Procedure concerning recommendations to Member States and international conventions. Articles 17(1) and 18(1) and (2) of the Rules of Procedure have already been referred to above when discussing UNESCO's reporting system.[221] Article 16(1) now states that the Director-General, while transmitting a certified copy of any convention or recommendation to member states, must formally remind them of their submission obligation under article IV(4) UNESCO Constitution.[222] He must also draw their attention to the difference in the legal nature of conventions and recommendations. Article 16(2) expects member states to "make the text of any convention or recommendation known to the bodies, target groups and other entities interested in matters dealt with therein". The Rules of Procedure now further contain provisions aimed at improving the quality of state reports and the effectiveness of their follow-up. Article 17(2) states that "[t]he General Conference may invite the Secretariat to assist the Member States . . . in the preparation and follow-up of such reports". Article 18(3) instructs the Director-General to "regularly inform the General Conference and Executive Board with respect to the implementation of the conclusions and decisions adopted by the General Conference concerning reports on conventions and recommendations".

It remains to be seen whether the co-operation recently established between UNESCO and the Committee on Economic, Social and Cultural Rights together with the new Rules of Procedure will ultimately lead to an improvement of UNESCO's system of monitoring implementation of its standard-setting instruments.[223]

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[218] *Ibidem* at para. 25.

[219] The Committee's proposals are contained in the document entitled "Proposals by the Committee on Conventions and Recommendations on the conditions and procedures applicable to the examination of questions relating to the implementation of UNESCO's standard-setting instruments" (2002) (UNESCO Doc. 164 EX/23).

[220] See "Rules of Procedure concerning recommendations to Member States and international conventions covered by the terms of Article IV, paragraph 4, of the Constitution: Amendment of Part VI thereof", 32 C/Resolution 77 of 15 October 2003.

[221] See 6.2.1.4.1. *supra.*

[222] On the submission obligation, see 6.2.1.3. *supra.*

[223] The Seventh Consultation with member states on the implementation of the Convention, and the Recommendation against Discrimination in Education will cover a six-year period (2000–2005). Guidelines for the preparation of state reports will presumably be sent to member states in 2005.

2.2.2. *The Convention on, and the Revised Recommendation concerning Technical and Vocational Education*[224]

In 1974, the General Conference of UNESCO adopted the *Revised Recommendation concerning Technical and Vocational Education*. An updated version thereof was adopted in 2001.[225] In 1989, UNESCO adopted the *Convention on Technical and Vocational Education*.[226] In contrast to the more detailed Recommendation, the Convention formulates a number of important principles in the sphere of technical and vocational education. As envisaged by article 23 ICESCR, the Recommendation and the Convention constitute international action for the achievement of article 13 ICESCR. The Recommendation and the Convention contribute to giving content to article 13(2) ICESCR, which concerns the various levels of education. Article 13(2) specifically refers to technical and vocational education in subparagraph (b), which requires that secondary education in its different forms, including technical and vocational secondary education, be made generally available and accessible to all.[227] Although technical and vocational education is often seen as a particular form of secondary education, it forms, in fact, part of all levels of education.

As pointed out, the 1974 version of the *Recommendation* has been replaced by an updated version of 2001. The Second International Congress on Technical and Vocational Education, convened by UNESCO and held at Seoul, South Korea from 26 to 30 April 1999, adopted Recommendations,[228] which recognised in paragraphs 1.1 to 1.3 that

> [t]he twenty-first century will bring a radically different economy and society with profound implications for . . . TVE. TVE systems must adapt to these key features which include globalisation, an ever-changing technological scenario, the revolution in information and communications, and the consequent

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[224] The texts of the Convention and the Recommendation are available at www.unesco.org. The UNESCO-UNEVOC International Centre for Technical and Vocational Education and Training, located in Bonn, Germany, is UNESCO's specialised centre for technical and vocational education and training. Its website is accessible via the website of UNESCO.

[225] On the 1974 version of the Revised Recommendation concerning Technical and Vocational Education, see Marks, 1977, pp. 45 *et seq*. and Gebert, 1996, pp. 81–84. See also the two reports prepared by UNESCO for consideration by the Committee on Economic, Social and Cultural Rights, contained in UN Docs. E/1982/10, pp. 14 *et seq*. and E/1988/7, p. 8. The 1974 version replaced the *Recommendation concerning Technical and Vocational Education* of 1962.

[226] On the Convention on Technical and Vocational Education (1989), which entered into force on 29 August 1991, see Krönner, 1992 and Gebert, 1996, pp. 81–84. So far, merely thirteen states have ratified the Convention. This figure is shown on the website of UNESCO (www.unesco.org) on 28 December 2004.

[227] See Gebert, 1996, p. 84.

[228] *Technical and Vocational Education and Training: A Vision for the Twenty-First Century: Recommendations to the Director-General of UNESCO.*

> rapid pace of social change. . . . These social and economic trends predicate the need for a new development paradigm. . . . TVE systems must . . . be reformed to give life to this new paradigm by achieving flexibility, innovation and productivity, imparting the skills required, addressing the implications of changing labour markets, training and retraining the employed, unemployed and the marginalised with the objective of achieving equality of opportunity for all in both the formal and informal sectors of the economy.

In the light of the results of the Congress, the Director-General of UNESCO has been invited to prepare an updated version of the Recommendation, taking into account the new trends identified by the Congress.[229] The updated version was submitted to the General Conference at its 31st session, and adopted on 2 November 2001.

The Recommendation defines "technical and vocational education" (TVE) as

> those aspects of the educational process involving, in addition to general education, the study of technologies and related sciences, and the acquisition of practical skills, attitudes, understanding and knowledge relating to occupations in various sectors of economic and social life. [It] is further understood to be:
> (a) an integral part of general education;
> (b) a means of preparing for occupational fields and for effective participation in the world of work;
> (c) an aspect of lifelong learning and a preparation for responsible citizenship;
> (d) an instrument for promoting environmentally sound sustainable development;
> (e) a method of facilitating poverty alleviation.[230]

The Recommendation calls upon member states of UNESCO to formulate and implement a policy directed to both the structural and the qualitative improvement of TVE.[231] Such a policy should support certain objectives laid down in the Recommendation.[232] Amongst others, these objectives stress that TVE should be a vital aspect of the educational process[233] and that it should exist as part of a system of lifelong learning.[234] The Recommendation appreciates that, in view of the importance of TVE, technical and vocational aspects should already be incorporated in general education.[235] Section 19 states that "[a]n initiation to technology and to the world of work should be an essential component of general

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[229] See 30 C/Resolution 14.
[230] Fig. I, sect. 2 Revised Recommendation.
[231] Fig. III (sects. 9–18) Revised Recommendation.
[232] The objectives are laid down in fig. II (sects. 5–8) Revised Recommendation.
[233] Fig. II, sect. 5 Revised Recommendation.
[234] Fig. II, sect. 6 Revised Recommendation.
[235] Fig. IV (sects. 19–23) Revised Recommendation deals with technical and vocational aspects of general education.

education . . . beginning in primary education and continuing through the early years of secondary education". Figure V (sections 24–44) recognises that TVE should actually prepare individuals for an occupational field. It makes recommendations concerning the organisation and programme content of TVE. Figure VI (sections 45–53) identifies the development of TVE as continuing education, *i.e.* within the framework of lifelong education, as a priority objective of educational strategies. The Recommendation also makes suggestions concerning guidance.[236] There are further recommendations concerning suitable methods and materials for TVE.[237] Figure IX (sections 72–92) regulates the training and status of teaching and of administrative and guidance staff. Emphasis is finally placed on international co-operation in the field of TVE.[238]

The preamble of the *Convention* refers to articles 23 and 26 UDHR on the rights to work and to education, respectively. It also mentions ILO instruments in the sphere of vocational guidance and training[239] and notes the co-operation between UNESCO and the ILO in the field concerned.[240]

The Convention comprises fifteen articles, articles 1 to 6 of a material nature, and articles 7 to 15 of a formal nature, pertaining to the implementation of the Convention.

Article 1(a) defines the term "technical and vocational education". It means

> all forms and levels of the educational process involving, in addition to general knowledge, the study of technologies and related sciences and the acquisition of practical skills, know-how, attitudes and understanding relating to occupations in the various sectors of economic and social life.

The Convention applies not only to TVE provided in educational institutions but also to that provided through co-operative programmes organised

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[236] Fig. VII (sects. 54–62) Revised Recommendation.

[237] Fig. VIII (sects. 63–71) Revised Recommendation.

[238] Fig. X (sects. 93–100) Revised Recommendation.

[239] The preamble mentions the Convention concerning Vocational Guidance and Vocational Training in the Development of Human Resources (1975) (ILO Convention No. 142) and the Recommendation concerning Vocational Guidance and Vocational Training in the Development of Human Resources (1975) (No. 150). The latter instrument was revised by the Recommendation concerning Human Resources Development: Education, Training and Lifelong Learning (2004) (No. 195). See 6.3.2.1. *infra* for a short note on ILO instruments relevant to education and vocational training.

[240] In a memorandum of 14 October 1954, UNESCO and the ILO agreed to delimit their activities in the sphere of technical and vocational education. According to the memorandum, the ILO's mandate relates to the teaching of practical skills for a particular profession, whereas that of UNESCO relates to technical and vocational education as part of the general education system.

jointly by educational institutions and undertakings related to the world of work.[241] A measure of flexibility is introduced by providing that states parties may apply the Convention "in accordance with [their] constitutional provisions and legislation".[242]

Article 2(1) obliges states parties to frame policies, to define strategies and to implement programmes for TVE. Article 2(2) enjoins states parties to provide a legislative or other framework for the development of TVE. This framework must indicate the objectives to be attained in TVE, "taking into consideration economic, social and cultural development needs and the personal fulfilment of the individual".[243] It must also indicate the relationship between TVE and other types of education, "with particular reference to horizontal and vertical articulation of programmes".[244] Access to TVE must be free from discrimination.[245]

Article 3(1) mentions factors to be taken account of in the provision and development of programmes of TVE, for example, the educational, cultural and social background of the population, the skills needed in the various sectors of the economy, employment opportunities, and so forth. Article 3(2) provides that TVE should be designed "to operate within a framework of open-ended and flexible structures in the context of lifelong education". This entails the following: TVE should provide an introduction to technology and to the world of work for all young persons within the context of general education.[246] Guidance should be available.[247] TVE must be designed so as to impart the knowledge needed for a skilled occupation.[248] It must be designed to provide a basis for the later updating of knowledge.[249] There should be complementary general education for those receiving initial technical and vocational training.[250] There must further be training courses for adults with a view to retraining as well as supplementing qualifications.[251]

In terms of article 4, states parties undertake to continuously develop their systems of TVE. Article 5(1) states that teachers must be adequately qualified. Teachers must have opportunities to update their skills.[252] Employ-

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[241] Art. 1(b) Convention.
[242] Art. 1(c) Convention.
[243] Art. 2(2)(a) Convention.
[244] Art. 2(2)(b) Convention.
[245] Art. 2(3) Convention.
[246] Art. 3(2)(a) Convention.
[247] Art. 3(2)(b) Convention.
[248] Art. 3(2)(c) Convention.
[249] Art. 3(2)(d) Convention.
[250] Art. 3(2)(e) Convention.
[251] Art. 3(2)(f) Convention.
[252] Art. 5(2) Convention.

ment conditions must be such as to attract teaching staff.[253] Article 6 envisages international co-operation in the field of TVE.

Supervision of the Recommendation and the Convention takes the form of consultations based on state reports, involving the Committee on Conventions and Recommendations.[254] Article 7 Convention contains a reporting obligation. It has already been stated that article VIII UNESCO Constitution lays down a general state reporting obligation concerning conventions and recommendations.[255] There have been two Consultations with regard to the 1974 version of the Recommendation so far, the First from 1988 to 1989 and the Second from 1990 to 1992.[256] The Second Consultation focused on six major areas of concern: vocational guidance, TVE for girls and women, the role of TVE for rural development, the promotion of co-operation between TVE and industrial enterprises, the professional preparation of teachers for TVE and the strengthening of international co-operation in the field of TVE. Fifty-four countries submitted reports. According to the Committee, the reports generally showed that in almost all the reporting states, TVE was seen as a means of human resource development, leading to social and economic progress. TVE had become a vital part of the education system and its role in the democratisation of education had been increasingly recognised. The Committee pointed out that some of the reports had underlined the role of TVE in keeping pace with new technological developments and in providing the much needed skilled manpower, especially in developing countries. The Committee regretted that in many developing countries budgetary constraints had limited the full development of TVE.[257] The Committee finally concluded that, when compared with the replies received from member states in the course of the First Consultation, the reports clearly demonstrated that the application of the Recommendation in the reporting states had been increased considerably.[258] A third consultation had originally been planned for 1998. In view of the Second International Congress on Technical and Vocational Education, convened by UNESCO and held at Seoul, South Korea from 26 to 30 April 1999, it was decided, however, to postpone the consultation and rather to have its major themes included among those presented at the Congress.[259] It is envisaged that future consultations with member

[253] Art. 5(3) Convention.

[254] The examination of state reports on the implementation of the Recommendation is entrusted to the Committee by 22 C/Resolution 25 (1983).

[255] See 6.2.1.4.1. *supra.*

[256] The Committee's reports are contained in the following UNESCO documents: First Consultation, Doc. 25 C/28 (1989) and Second Consultation, Doc. 27 C/89 (1993).

[257] See UNESCO Doc. 27 C/89 (1993), para. 128.

[258] See *ibidem* at para. 137.

[259] See 154 EX/Decision 4.3.

states concerning the implementation of the 2001 version of the Recommendation are to be conducted together with the five-yearly assessments of the follow-up to the Seoul Congress.[260]

2.2.3. *The Recommendation concerning the Status of Teachers, and the Recommendation concerning the Status of Higher-Education Teaching Personnel*[261]

In 1966, the *Recommendation concerning the Status of Teachers* was adopted at a Special Intergovernmental Conference convened by UNESCO with the participation of the ILO and held at Paris, France.[262] The UNESCO/ILO Recommendation was the first international declaration on the status of teachers in history and represented a giant step forward in defining the rights and duties of members of the teaching profession throughout the world.[263] As envisaged by article 23 ICESCR, the Recommendation constitutes international action for the achievement of article 13 ICESCR. The Recommendation contributes to giving content to article 13(2)(e) ICESCR, which requires that the material conditions of teaching staff be continuously improved. In particular, sections 82 to 84 on the labour and trade union rights of teachers, figure X on teachers' salaries and figure XI on social security contribute to the stated goal.[264]

The Recommendation remains one of the most important international tools for bringing about improvements in the teaching profession. In its preamble, the Recommendation refers to article 26 UDHR on the right to education, to various ILO instruments on freedom of association, the right to organise and to collective bargaining, equal remuneration and non-discrimination, and to the CDE. The preamble also emphasises diversity in the organisation of education. The Recommendation is an extensive document and consists of 146 sections.

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[260] See the preamble to the 2001 version of the Recommendation.

[261] The texts of both instruments are available at www.unesco.org.

[262] On the Recommendation concerning the Status of Teachers, see Marks, 1977, p. 46, Towsley, 1991, pp. 1–19 and Gebert, 1996, pp. 78–81. See also the two reports prepared by UNESCO for consideration by the Committee on Economic, Social and Cultural Rights, contained in UN Docs. E/1982/10, pp. 15 *et seq*. and E/1988/7, p. 9. In 1993, the Director-General presented a "Preliminary study on the desirability of adopting a Convention concerning the Status of Teachers" (1993) (UNESCO Doc. 27 C/42). The General Conference considered the preparation of such a convention premature, however. See 27 C/Resolution 1.16.

[263] The adoption of the Recommendation came after two decades of exploratory meetings, proposals and world-wide consultations with teachers and intergovernmental organisations. The origin of the Recommendation can be traced as early as 1946 with a request by the delegate of China at the First Session of the UNESCO General Conference that a World Teachers' Charter be drafted and promulgated.

[264] See Gebert, 1996, p. 81.

For purposes of the Recommendation, the word "teacher" covers all those persons in schools who are responsible for the education of pupils.[265] The expression "status" means both the social standing of teachers (*i.e.* their standing as evidenced by the appreciation of the importance of their function and of their competence) and the working conditions, remuneration and other material benefits accorded to teachers relative to other professional groups.[266] The Recommendation applies to teachers in public and private schools from the pre-primary up to completion of the secondary stage of education.[267] The following matters are covered by the Recommendation:

- guiding principles (*e.g.* that education should be directed to the all-round development of the human personality (section 3), that advance in education depends on the qualifications and ability of teachers (section 4) and that all aspects of the preparation and employment of teachers should be free from any form of discrimination (section 7)) (figure III, sections 3–9);
- educational objectives and policies (figure IV, section 10);
- preparation for the profession (selection, teacher-preparation programmes and teacher-preparation institutions) (figure V, sections 11–30);
- further education for teachers (figure VI, sections 31–37);
- employment and career (entry into the teaching profession, advancement, security of tenure, disciplinary procedure, medical examinations, women teachers with family responsibilities and part-time service) (figure VII, sections 38–60);
- rights and responsibilities of teachers (professional freedom, relations between teachers and the education service, rights and responsibilities of teachers) (figure VIII, sections 61–84);
- conditions for effective teaching and learning (class size, ancillary staff, teaching aids, hours of work, annual holidays with pay, study leave, special leave, sick leave and maternity leave, teacher exchange, school buildings, teachers in rural and remote areas) (figure IX, sections 85–113);
- teachers' salaries (figure X, sections 114–124);
- social security (medical care, sickness benefit, employment injury benefit, old-age benefit, invalidity benefit, survivor's benefit, means of providing social security for teachers) (figure XI, sections 125–140);
- teacher shortage (figure XII, sections 141–145); and
- final provision (providing that the Recommendation may not be invoked to diminish a more favourable status already granted to teachers) (figure XIII, section 146).

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[265] Fig. I, sect. 1(a) Recommendation.
[266] Fig. I, sect. 1(b) Recommendation.
[267] Fig. II, sect. 2 Recommendation.

The Recommendation contains sections on important guiding principles concerning the status of teachers. Examples are sections 5, 8 and 9 Recommendation:

> 5. The status of teachers should be commensurate with the needs of education as assessed in the light of educational aims and objectives; it should be recognised that the proper status of teachers and due public regard for the profession of teaching are of major importance for the full realisation of these aims and objectives.
> 8. Working conditions for teachers should be such as will best promote effective learning and enable teachers to concentrate on their professional tasks.
> 9. Teachers' organisations should be recognised as a force which can contribute greatly to educational advance and which therefore should be associated with the determination of educational policy.

The underlying idea of the Recommendation is that there is a close interrelationship between the education system of a country and the status it accords to its teachers. A society which neglects its education system will also not concern itself with the status of its teachers. Conversely, if teachers enjoy a recognised social status, this will impact beneficially on the quality of the education system. In this sense, then, the Recommendation is concerned with the whole of a country's education system. It is thus more than a code regulating the profession of teaching.[268]

A protective instrument has also been prepared for higher-education teaching personnel. In 1997, the General Conference of UNESCO adopted the *Recommendation concerning the Status of Higher-Education Teaching Personnel*. Like the Recommendation concerning the Status of Teachers, the Recommendation contributes to giving content to article 13(2)(e) ICESCR. In particular, sections 52 to 56 on the negotiation of terms of employment, sections 57 to 62 on salaries and sections 63 and 64 on social security benefits contribute to the stated goal.

In its preamble, the Recommendation refers to article 26 UDHR on the right to education, to article 13(2)(c) ICESCR on the responsibility of states for the provision of higher education, to the CDE, to the UNESCO/ILO Recommendation concerning the Status of Teachers (1966) and the UNESCO Recommendation on the Status of Scientific Researchers (1974), and to various ILO instruments on freedom of association and the right to organise and to collective bargaining and on equality of opportunity

[268] See Gebert, 1996, p. 78. In the final analysis, therefore, the Recommendation is also directed at advancing students' right to quality primary and secondary education, and may thus be seen to give content to art. 13(2)(a) and (b) ICESCR.

and treatment. The preamble further stresses that the right to education can only be fully enjoyed in an atmosphere of academic freedom and autonomy for institutions of higher education. It also emphasises diversity in the organisation of higher education.

The Recommendation applies to all "higher-education teaching personnel".[269] This means "all those persons in institutions or programmes of higher education who are engaged to teach and/or to undertake scholarship and/or to undertake research and/or to provide educational services to students or to the community at large".[270] "Higher education" refers to education at the post-secondary level.[271] The following matters are covered by the Recommendation:

- guiding principles (*e.g.* that advances in higher education depend on infrastructure and resources and on the qualifications and expertise of higher-education teaching personnel, underpinned by academic freedom and institutional autonomy (section 5) and that respect should be shown for the diversity of higher education (section 9)) (figure III, sections 3–9);
- educational objectives and policies (figure IV, sections 10–16);
- institutional rights, duties and responsibilities (institutional autonomy and institutional accountability) (figure V, sections 17–24);
- rights and freedoms of higher-education teaching personnel (individual rights and freedoms (civil rights, academic freedom, publication rights and the international exchange of information) and self-governance and collegiality) (figure VI, sections 25–32);
- duties and responsibilities of higher-education teaching personnel (figure VII, sections 33–36);
- preparation for the profession (figure VIII, sections 37–39);
- terms and conditions of employment (entry into the academic profession, security of employment, appraisal, discipline and dismissal, negotiation of terms and conditions of employment, salaries, workload, social security benefits, health and safety, study and research leave and annual holidays, terms and conditions of employment of women, disabled and part-time higher-education teaching personnel) (figure IX, sections 40–72);
- utilisation and implementation (figure X, sections 73–76);[272] and

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[269] Fig. II, sect. 2 Recommendation.
[270] Fig. I, sect. 1(f) Recommendation.
[271] Fig. I, sect. 1(a) Recommendation.
[272] Note should be taken of sects. 73 and 74 Recommendation. Sect. 73 states, "Member States and higher education institutions should take all feasible steps to extend and complement their own action in respect of the status of higher-education teaching personnel by encouraging co-operation with and among all national and international governmental and non-governmental organisations whose activities fall within the scope and objectives of [the] Recommendation". Sect. 74 states, "Member States and higher education institutions

- final provision (providing that the Recommendation may not be invoked to diminish a more favourable status already granted to higher-education teaching personnel) (figure XI, section 77).

Like the Recommendation concerning the Status of Teachers, the present Recommendation is more than a code regulating the profession of teaching, in this case, in the sphere of higher education. It is aimed not only at improving the position of higher-education teaching personnel, but, also, as a result of improvements in their position, at enhancing the quality of the higher education system. The Recommendation thus provides that the working conditions for higher-education teaching personnel must be such as to promote high quality teaching and training for research.[273] It may, therefore, be stated that the Recommendation is also directed at advancing students' right to quality higher education, and may thus be seen to give content to article 13(2)(c) ICESCR.

Of particular significance are the provisions of the Recommendation on institutional autonomy, and on the civil rights of teaching personnel, including that of academic freedom, and their rights to self-governance and to collegiality. Only few international instruments hitherto lay down protective standards applicable to institutional autonomy and academic freedom.[274] This justifies introducing the provisions concerned.[275]

The Recommendation distinguishes between institutional rights and duties and those of higher-education teaching personnel.

The prime institutional right is that of *institutional autonomy*, provided for in figure V, part A, sections 17 to 21 Recommendation. Section 17 defines institutional autonomy as

> that degree of self-governance necessary for effective decision-making by institutions of higher education regarding their academic work, standards, management and related activities consistent with systems of public accountability, especially in respect of funding provided by the state, and respect for academic freedom and human rights.

Autonomy is the institutional form of academic freedom and a necessary precondition to guarantee the proper fulfilment of the functions entrusted

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should take all feasible steps to apply the provisions [of the Recommendation] to give effect, within their respective territories, to the principles set forth in [the] Recommendation".

[273] See notably sect. 7 Recommendation, which states that "[w]orking conditions for higher-education teaching personnel should be such as will best promote effective teaching, scholarship, research and extension work and enable higher-education teaching personnel to carry out their professional tasks".

[274] See, for example, the ICESCR, which in art. 15(3) states, "The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity".

[275] See also the discussion of academic freedom and institutional autonomy at 10.4.1.1.2. *infra*.

to higher education institutions, namely, teaching and research.[276] The Recommendation obliges member states "to protect higher education institutions from threats to their autonomy coming from any source".[277] Self-governance and collegiality are essential components of meaningful autonomy for institutions of higher education.[278]

The prime institutional duty is that of *institutional accountability*, provided for in figure V, part B, sections 22 to 24 Recommendation. Section 22 calls upon member states and higher education institutions to ensure "a proper balance between the level of autonomy enjoyed by higher education institutions and their systems of accountability". Higher education institutions should endeavour to open their governance to be accountable. For example, they should be accountable for effective support of academic freedom and fundamental human rights,[279] ensuring high quality education[280] and the efficient use of resources.[281]

The rights of higher-education teaching personnel are set out in figure VI, part A, sections 25 to 30 and part B, sections 31 to 32 Recommendation. Part A elaborates on the civil rights of teaching personnel and part B on their rights to self-governance and to collegiality.

Section 26 stipulates that higher-education teaching personnel should enjoy the civil and political rights applicable to all citizens. They should enjoy freedom of thought, conscience, religion, expression, assembly and association as well as the right to liberty and security of the person and liberty of movement. Section 27 further recognises that it is of special importance that *the right to academic freedom* be scrupulously observed. The right of higher-education teaching personnel to academic freedom means:

> the right, without constriction by prescribed doctrine, to freedom of teaching and discussion, freedom in carrying out research and disseminating and publishing the results thereof, freedom to express freely their opinion about the institution or system in which they work, freedom from institutional censorship and freedom to participate in professional or representative academic bodies.

Section 28 lays down the right of higher-education teaching personnel to teach without interference. Section 29 lays down their right to carry out research work without interference and their right to publish and communicate the conclusions of the research of which they are authors or co-authors.

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[276] Fig. V, part A, sect. 18 Recommendation.
[277] Fig. V, part A, sect. 19 Recommendation.
[278] Fig. V, part A, sect. 21 Recommendation.
[279] Fig. V, part B, sect. 22(c) Recommendation.
[280] Fig. V, part B, sect. 22(d) Recommendation.
[281] Fig. V, part B, sect. 22(j) Recommendation.

Higher-education teaching personnel further hold the rights to *self-governance* and to *collegiality*. The former, in terms of section 31 Recommendation, means the right of teaching personnel "without discrimination of any kind, according to their abilities, to take part in the governing bodies and to criticise the functioning of higher education institutions . . . [and also] . . . the right to elect a majority of representatives to academic bodies within the higher education institution". The latter, in terms of section 32, includes "academic freedom, shared responsibility, the policy of participation of all concerned in internal decision-making structures and practices, and the development of consultative mechanisms".

The duties of higher-education teaching personnel are set out in figure VII, sections 33 to 36 Recommendation. Duties are, for example, to teach students effectively, to conduct scholarly research or to maintain and develop knowledge of the subject, and to base research and scholarship on an honest search for knowledge.[282]

Both the Recommendation concerning the Status of Teachers and the Recommendation concerning the Status of Higher-Education Teaching Personnel deal with international labour law as well as international education law. The supervision of both instruments is, therefore, entrusted to a Joint ILO/UNESCO Committee of Experts on the Application of the Recommendations concerning Teaching Personnel (CEART).[283] The Committee is composed of twelve independent experts—six appointed by UNESCO and six by the ILO. Sessions of the Committee are held every three years.[284]

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[282] Fig. VII, sect. 34(a)–(c) Recommendation.

[283] Prior to 2001, the Committee was known as the Joint ILO/UNESCO Committee of Experts on the Application of the Recommendation concerning the Status of Teachers (CEART). In 1998, the Committee's mandate was extended to cover the monitoring of the Recommendation concerning the Status of Higher-Education Teaching Personnel. A website has been designed for the Committee at www.ilo.org/public/english/dialogue/sector/techmeet/ceart/main.htm.

[284] This has been resolved in 2000. Before that, the Committee held Ordinary and Special Sessions, depending on the nature of the work involved. The First to Sixth Ordinary Sessions were held in 1968, 1970, 1976, 1982, 1988 and 1994 and the First to Fourth Special Sessions in 1978, 1985, 1991 and 1997, respectively. In 2000, the Committee held its Seventh, and, in 2003, its Eighth Session. The Committee's reports on the various sessions are contained in the following documents: First Ordinary Session, CEART/I/1968/(not traceable), Second Ordinary Session, CEART/II/1970/4, Third Ordinary Session, CEART/III/1976/10, First Special Session, CEART/SP/1979/7, Fourth Ordinary Session, CEART/IV/1982/12, Second Special Session, CEART/SP/1985/(not traceable), Fifth Ordinary Session, CEART/V/1988/5, Third Special Session, CEART/SP/1991/12, Sixth Ordinary Session, CEART/VI/1994/12, Fourth Special Session, CEART/SP/1997/13, Seventh Session, CEART/VII/2000/10 and Eighth Session, CEART/VIII/2003/11.

The Committee performs two tasks. Firstly, it examines relevant data to adjudge the application of the Recommendations. Secondly, it examines allegations from teachers' organisations on the non-observance of the Recommendations' provisions in member states.

The examination of data to adjudge application was conducted up to the Fifth Ordinary Session in 1988 in the form of consultations based on state reports, which were obtained through responses by member states to a questionnaire.[285] The Committee came to question the effectiveness of the questionnaire methodology, however, and proposed a shift to a more interactive and integrated programme of action aimed at monitoring implementation. Consequently, a restatement of the mandate and methods of work of the Committee[286] was endorsed by UNESCO.[287] The Committee is now competent to rely on sources of information, such as reports submitted by governments, by national organisations representing teachers and their employers, by UNESCO or the ILO, and by relevant intergovernmental or non-governmental organisations, surveys on specific themes, in-depth studies, and consultations with employers and teachers' organisations. The Sixth to Eighth Sessions of the Committee were based on the new working methods.

The Committee is further competent to deal with allegations related to the provisions of either Recommendation, emanating from a national or teachers' organisation and not falling within the competence of any other monitoring body of the ILO or UNESCO (such as the Committee on Conventions and Recommendations).[288] The Committee first considers the content of an allegation. It then issues its findings and recommendations for the resolution of the problem. The report of the Committee on the latest session contains comments on seven allegations, concerning illegal termination of teachers held to have expressed views unacceptable to the government (Bangladesh), non-observance of the Recommendation concerning the Status of Teachers in relation to the introduction of a system of evaluation of teachers (Japan), low teacher salaries, inadequate family allowances and the government's refusal to negotiate in spite of repeated strikes (Burundi), a poor salary situation, forced transfers and tensions over

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[285] The First Consultation took place from 1968–1970, the Second from 1974–1976, the Third from 1981–1982 and the Fourth from 1987–1988. The four consultations are reported on in the reports of the Second, Third, Fourth and Fifth Ordinary Sessions, respectively. See note 284 *supra*.

[286] See Doc. CEART/SP/1991/12.

[287] See 138 EX/Decision 7.1.1 and 25 C/Resolution 1.23.

[288] On the relation between CEART and the Committee on Conventions and Recommendations regarding communications concerning alleged human rights violations, see UNESCO Doc. 169 EX/7 (2004), Annex, paras. 1–3.

language instruction as a matter of educational policy (Ethiopia), and discrimination with regard to remuneration and maternity leave of part-time teachers (Japan).[289]

The Committee concludes a session by drawing up a report in which it makes recommendations to the Executive Board of UNESCO and to the Governing Body of the ILO on measures to improve implementation of the Recommendations. This report is then examined by the Committee on Conventions and Recommendations, before it is transmitted to the Executive Board and to the General Conference, and before it is ultimately made available to member states, National Commissions, the UN and NGOs of the teaching profession.[290]

The discussion may be concluded by referring to some of the Committee's views with regard to the Recommendation concerning the Status of Teachers, as reflected in its jurisprudence so far:[291]

- Salaries of teachers which are substantially lower than salaries in the private sector of the economy violate the Recommendation.
- Salary differentials are permissible, provided they are based on criteria such as levels of qualification, years of experience or degrees of responsibility.
- Merit-rating systems for purposes of salary determination may be applied, but only with the prior acceptance by teachers' organisations.
- Teachers are entitled to benefit from salary increments granted at regular intervals. The progression from the minimum to the maximum of the basic salary scale must not extend over a period longer than twelve to fifteen years.
- Teachers have a right to collective bargaining to determine salaries.
- A categorical ban on strikes by teachers violates the Recommendation.

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[289] See the report on the Eighth Session, Doc. CEART/VIII/2003/11, paras. 85–90. Annex 2 to the report contains a summary of the substance of the allegations as well as the Committee's findings and recommendations.

[290] In its latest report, Doc. CEART/VIII/2003/11, p. v, CEART, after having studied a wide range of information, arrived at the following conclusions regarding the current situation of teaching personnel, "The most serious issue facing the teaching profession is the actual or impending shortage of qualified teachers. The growing demand for teachers caused by Education for All, combined with an ageing teaching population in developed countries, will create shortages of at least 15 million teachers in the next decade. Social dialogue in education remains extremely fragile. This is due to the apparent reluctance of public authorities to engage in meaningful consultations with teacher organisations in a context of limited budgetary resources. Although the information before the Joint Committee discloses progress in some areas such as the introduction of tertiary qualifications for new teachers in an increasing number of countries, nevertheless the issue of teacher qualifications remains of concern in many developing countries. In the area of higher education security of tenure or its functional equivalent are common institutions, but a growing resort to part-time and temporary employment constitutes a threat to academic freedom".

[291] See Gebert, 1995, p. 5 and p. 7.

2.2.4. *The Recommendation concerning Education for International Understanding, Co-operation and Peace and Education relating to Human Rights and Fundamental Freedoms*[292]

Another important instrument adopted by the General Conference of UNESCO is the *Recommendation concerning Education for International Understanding, Co-operation and Peace and Education relating to Human Rights and Fundamental Freedoms* of 1974.[293] The Recommendation must be understood in the light of UNESCO's purpose as laid down in article I(1) UNESCO Constitution, which is to contribute to peace and security by promoting co-operation among the nations through education, science and culture, with the final aim of furthering universal respect for justice, for the rule of law and for human rights and fundamental freedoms. The Recommendation is intended to promote this final aim of UNESCO through education.[294] As envisaged by article 23 ICESCR, the Recommendation constitutes international action for the achievement of article 13 ICESCR. The Recommendation contributes to giving content to article 13(1) ICESCR, in as far as the latter provision requires education to strengthen respect for human rights and fundamental freedoms, to promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups and to further the activities of the UN for the maintenance of peace.[295]

In its preamble, the Recommendation refers to the responsibility of states to achieve through education the objectives of the UN Charter, the UNESCO Constitution and the UDHR. Member states are called upon to take whatever legislative or other steps may be required to give effect to the Recommendation. They are further urged to bring the Recommendation to the attention of the authorities responsible for school, higher and out-of-school education and of the various organisations carrying out educational work among young people and adults, such as student movements, associations of pupils' parents and teachers' unions.

The Recommendation states that the terms "international understanding", "co-operation" and "peace" should be considered as an indivisible whole based on the principle of friendly relations between peoples and states and on respect for human rights and fundamental freedoms. It states

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[292] The text of the Recommendation is available at www.unesco.org.

[293] On the Recommendation concerning Education for International Understanding, Co-operation and Peace and Education relating to Human Rights and Fundamental Freedoms, see Marks, 1977, pp. 44 *et seq.*, Reich and Pivovarov, 1994 and Gebert, 1996, pp. 84–88. See also the two reports prepared by UNESCO for consideration by the Committee on Economic, Social and Cultural Rights, contained in UN Docs. E/1982/10, pp. 16 *et seq.* and E/1988/7, pp. 9 *et seq.*

[294] See Gebert, 1996, pp. 84–85.

[295] See *ibidem* at pp. 87–88.

that the different connotations of the terms may be gathered together in the expression "international education".[296] "Human rights" and "fundamental freedoms", for purposes of the Recommendation, are those defined in the UN Charter, the UDHR, and the ICCPR and the ICESCR.[297] The Recommendation applies to all stages and forms of education.[298]

Figure III (sections 3 to 6) Recommendation sets out a number of guiding principles which are to serve as a point of reference for "international education". Section 3 quotes the aims of education proclaimed in article 26(2) UDHR, thereby stressing their importance. Against the background of the educational aims of the UDHR, the Recommendation proceeds to formulate the following guiding principles of educational policy:

- an international dimension and a global perspective in education at all levels and in all its forms;
- understanding for all peoples, their cultures, civilisations, values and ways of life;
- awareness of the increasing global interdependence between peoples and nations;
- abilities to communicate with others;
- awareness not only of the rights, but also of the duties of individuals, groups and nations towards each other;
- understanding of the necessity for international solidarity and co-operation; and
- readiness of the individual to participate in solving the problems of his community, his country and the world at large.[299]

Section 5 goes on to state that "international education" should enable the individual:

- to develop a sense of social responsibility and of solidarity with less privileged groups and to observe the principles of equality in everyday conduct;
- to acquire a critical understanding of problems at the national and the international level;
- to understand and explain facts, opinions and ideas;
- to work in a group;

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[296] Fig. I, sect. 1(b) Recommendation.
[297] Fig. I, sect. 1(c) Recommendation.
[298] Fig. II, sect. 2 Recommendation. See further the wide definition in sect. 1(a) of the word "education", being described as "the entire process of social life by means of which individuals and social groups learn to develop consciously within, and for the benefit of, the national and international communities, the whole of their personal capacities, attitudes, aptitudes and knowledge".
[299] Fig. III, sect. 4(a)–(g) Recommendation.

- to accept and participate in free discussions;
- to observe the elementary rules of procedure applicable to any discussion; and
- to base value judgements and decisions on a rational analysis of relevant facts and factors.

Section 6 provides that education should stress the inadmissibility of recourse to war or to the use of force and violence for purposes of aggression. Education should contribute to the struggle against colonialism, racism, fascism and apartheid.

In figure IV (sections 7 to 9), the Recommendation directs member states to formulate and apply national policies aimed at strengthening the contribution of education to international understanding, co-operation and peace and respect for human rights and fundamental freedoms.[300] The National Commissions of UNESCO are to play an important co-ordinating role in this regard.[301] Member states should provide the financial, administrative, material and moral support necessary to implement the Recommendation.[302]

Figure V (sections 10 to 21) Recommendation concerns particular aspects of international education: International education should thus involve a study of ethical[303] and civil[304] issues, of different cultures and of the major problems of mankind.[305] Member states should develop an international dimension at all stages and in all forms of education.[306] Teachers should be adequately prepared for their role in pursuing the objectives of the Recommendation.[307] Figure VIII (sections 38 to 40) contains suggestions on educational equipment and materials. Figure IX (sections 41 to 42)

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[300] Fig. IV, sect. 7 Recommendation.
[301] Fig. IV, sect. 8 Recommendation.
[302] Fig. IV, sect. 9 Recommendation.
[303] Member states should, for example, take steps to develop attitudes and behaviour based on recognition of the equality and necessary interdependence of nations and peoples (sect. 10).
[304] Member states should, for example, promote an active civic training which will enable every person to gain a knowledge of the method of operation and the work of public institutions, whether local, national or international, to become acquainted with the procedures for solving fundamental problems (sect. 13).
[305] Education should, for example, involve a study of the different types of war and their causes and effects (sect. 18(b)), of the struggle against illiteracy, the campaign against disease and famine, the fight for a better quality of life and the highest attainable standard of health, and population growth (sect. 18(d)), of the use, management and conservation of natural resources, and pollution of the environment (sect. 18(e)) and of the preservation of the cultural heritage of mankind (sect. 18(f)).
[306] Fig. VI (sects. 22–32) Recommendation. The Recommendation refers also to pre-school education (sect. 24) and out-of-school education (sect. 30).
[307] Fig. VII (sects. 33–37) Recommendation.

emphasises the importance of research and experimentation in the field of international education. Figure X (sections 43 to 45), finally, holds that member states should consider international co-operation a duty in developing international education.

Altogether, the Recommendation may be described as

> a milestone in the development of the paradigm of a "world society", emerging beyond—and in spite of—the frontiers between different political systems. It focuses on major world problems and reflects the growing interdependence of all regions and nations, stipulating that this interdependence calls for new commitments, obligations and duties for the world community as well as for individuals and peoples.[308]

The Recommendation is supervised within a Permanent System of Reporting on Education for Peace, Human Rights, Democracy, International Understanding and Tolerance.[309] The essential features of this system of reporting are the following:[310] Every six years, member states must submit a national report to the General Conference on progress made in implementing the Recommendation. A synthesis of the reports, prepared by the Director-General, is examined by the Committee on Conventions and Recommendations, before it is transmitted to the Executive Board and to the General Conference. The Secretariat further conducts in-depth studies and consultative missions concerning the major questions relating to the implementation of the Recommendation. Finally, once every six years, UNESCO publishes a world status report on progress made in implementing the Recommendation based on national reports and the results of the in-depth studies and consultative missions.[311]

In 1991, the General Conference invited the Director-General to consider the question of revising the Recommendation, "to ensure that it better reflects the new context of international education in the light of the considerable recent changes in the international situation".[312] This led to

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[308] Reich and Pivovarov, 1994, p. 13.

[309] The system has been set up by 23 C/Resolution 13.3 (1985). The latter resolution, in para. 1, calls the system "a permanent system of reporting on the steps taken by Member States to apply the Recommendation concerning Education for International Understanding, Co-operation and Peace and Education relating to Human Rights and Fundamental Freedoms". The system's name has subsequently been changed to that shown above.

[310] See 23 C/Resolution 13.3 (1985), para. 1.

[311] In the past, an Advisory Committee on Education for Peace, Human Rights, Democracy, International Understanding and Tolerance, composed of independent experts, played a key role in the examination of national reports in the context of the Permanent System of Reporting. According to oral information of UNESCO dated 27 July 2004, however, the Committee has become dysfunctional.

[312] See 26 C/Resolution 7.4 (1991). See also the report of the Director-General, entitled "Desirability of replacing by a convention the Recommendation concerning Education

the revision of the Permanent System of Reporting in 1995, in the sense that it was decided that the system should cover, additionally to the Recommendation, (*inter alia*) the following instruments:[313]

- the *World Plan of Action on Education for Human Rights and Democracy*;[314]
- the *Vienna Declaration* and *Programme of Action*;[315]
- the *Declaration*[316] and *Integrated Framework of Action*[317] *on Education for Peace, Human Rights and Democracy*; and
- the *Plan of Action of the United Nations Decade for Human Rights Education (1995–2004).*[318]

So far, there have been three consultations within the Permanent System of Reporting.[319] The Third Consultation focused on the Declaration and Integrated Framework of Action on Education for Peace, Human Rights and Democracy. Declaration and Framework of Action reaffirm the objectives

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for International Understanding, Co-operation and Peace and Education relating to Human Rights and Fundamental Freedoms" (1991) (UNESCO Doc. 26 C/38 Rev.).

[313] The revision of the system was effected by 28 C/Resolution 5.41 (1995).

[314] The World Plan of Action on Education for Human Rights and Democracy was adopted at the International Congress on Education for Human Rights and Democracy, convened at Montreal, Canada from 8–11 March 1993 by UNESCO and the UN Centre for Human Rights. It builds on the 1974 Recommendation and further the *Principles of the International Congress on the Teaching of Human Rights*, which emerged from the UNESCO International Congress on the Teaching of Human Rights, held at Vienna, Austria from 12–16 September 1978, and the *Malta Recommendations on Human Rights Teaching, Information and Documentation*, which emerged from the UNESCO International Congress on Human Rights Teaching, Information and Documentation, held in Malta from 31 August–5 September 1987. The World Plan of Action on Education for Human Rights and Democracy is available on the website of UNESCO at www.unesco.org.

[315] The Vienna Declaration and Programme of Action were adopted at the World Conference on Human Rights, held at Vienna, Austria from 14–25 June 1993. See UN Doc. A/CONF.157/23.

[316] The Declaration was adopted at the forty-fourth session of the International Conference on Education, held at Geneva, Switzerland in 1994. It has been endorsed by the twenty-eighth session of the General Conference of UNESCO in 1995. The Declaration is available on the website of UNESCO at www.unesco.org.

[317] The Integrated Framework of Action on Education for Peace, Human Rights and Democracy was prepared by the Director-General of UNESCO and has been approved by the twenty-eighth session of the General Conference of UNESCO in 1995. The Framework of Action is available on the website of UNESCO at www.unesco.org.

[318] UNGA Resolution 49/184 of 23 December 1994 proclaimed the ten-year period beginning on 1 January 1995 the United Nations Decade for Human Rights Education. The Plan of Action is contained in the "Note by the Secretary-General", UN Doc. A/51/506/Add.1 of 12 December 1996.

[319] The following synthesis reports are available: First Consultation, UNESCO Doc. 25 C/30 (1989), Second Consultation, Doc. ED-BIE/CONFINTED 44/INF.2 (1994) and Third Consultation, UNESCO Doc. 31 C/INF.5 (2001). The following world status reports on international education are available: (First) Sexennial Report, UNESCO Doc. 26 C/32 (1991) and (Second) Sexennial Report, UNESCO Doc. 29 C/INF.4 (1997).

of the Recommendation. Additionally, the following aims of "education for peace, human rights and democracy" are referred to:[320]

- The ultimate goal of education for peace, human rights and democracy is the development in every individual of a sense of universal values and types of behaviour on which a culture of peace is predicated.
- Education must develop the ability to value freedom and the skills to meet its challenges.
- Education must develop the ability to recognise and accept the values which exist in the diversity of individuals, genders, peoples and cultures and develop the ability to communicate, share and co-operate with others.
- Education must develop the ability of non-violent conflict-resolution.
- Education must cultivate in citizens the ability to make informed choices, basing their judgements and actions not only on the analysis of present situations, but also on the vision of a preferred future.
- Education must teach citizens to respect the cultural heritage, protect the environment, and adopt methods of production and patterns of consumption which lead to sustainable development.
- Education should cultivate feelings of solidarity and equity at the national and international levels in the perspective of a balanced and long-term development.

These aims of education, like those of the 1974 Recommendation, may be considered to interpret and update the educational aims laid down in article 13(1) ICESCR. The synthesis report of the Third Consultation shows that, despite progress, many factors still prevent the full implementation of commitments in the field of education presently under discussion, such as that many states allocate insufficient resources for the realisation of the commitments referred to, that matters relating to racial discrimination are not satisfactorily addressed in educational curricula, or that environmental education still does not emphasise the "ever closer ties between peace, the environment and development".[321]

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[320] See Integrated Framework of Action on Education for Peace, Human Rights and Democracy, paras. 6–12.

[321] In the Third Consultation, only 33 countries out of 185 submitted a report. The synthesis report of this consultation reached the following conclusions: 1. Progress has been achieved in fostering a greater awareness of the importance of international education, but there is not always an observable match between the commitments made and the means allocated for their implementation. 2. Although formal education remains the sector in which the greatest number of activities are being promoted in this field, it is absolutely essential to link such action to all schemes being carried out in the informal education sector. 3. The back-up action of local associations and NGOs, who more and more are working hand in hand with government authorities in order to increase public awareness and to provide for the training of trainers, deserves to receive more extensive encouragement and support. 4. Language teaching, including the teaching of foreign languages and the

UNESCO has been active in developing numerous projects aimed at promoting international education. Reference may be made to the following two: the UNESCO Associated Schools Project Network (ASPnet) and UNESCO Chairs on education for peace, human rights and democracy.[322]

The *UNESCO Associated Schools Project Network*[323] is a network of educational institutions, ranging from pre-school to teacher training, throughout the world, committed to the ideals of UNESCO.[324] It was launched in 1953 and promotes education for international understanding in order to prepare children and young people to meet the pressing challenges facing humanity. The main emphasis of the network is on integrating international elements into the regular curriculum rather than to treat them as separate subjects. The main themes of study are world concerns and the UN system in dealing with them, human rights, democracy and tolerance, intercultural learning, and environmental issues.

The *UNESCO Chairs* project, established in 1992, involves the creation of chairs at universities in UNESCO member states pursuant to agreements signed between UNESCO and the universities concerned. The purpose of the chairs is to promote an integrated approach to research, training, and information and documentation activities in the one or other field of international education. The project also extends to various areas of education emerging from the 1974 Recommendation. There exist UNESCO Chairs on subject areas, such as education for peace, human rights and democracy; cultural rights; civic education; sustainable development, environmental sciences and social problems; or minority studies.

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mother tongues of minorities and indigenous peoples, is an effective means of fostering mutual understanding at the intercultural and international level. 5. Ever greater efforts have been made to integrate gender-related issues into educational curricula and institutional practices. 6. Issues relating to racial discrimination, xenophobia and ethnic and religious intolerance are still accorded very little prominence in educational curricula. 7. Although environmental education has in recent times begun to occupy a front-rank position in many countries, it has not yet taken on the scale of what might be defined as education for the planet's survival and world ethics. 8. In view of the proliferation of endemic diseases and the consequences thereof at the human and social levels, preventive education schemes should be given the widest possible support. 9. The development of national, regional and international networking arrangements serves to strengthen information pooling and the exchange of documentation, innovatory experimental outcomes and research findings on different subjects and aspects of international education. See UNESCO Doc. 31 C/INF.5 (2001), Annex, para. 12.

[322] On the two UNESCO projects, see UNESCO Doc. 29 C/INF.4 (1997), paras. 26–27 and paras. 32–33.

[323] For more information on the UNESCO Associated Schools Project Network, see the website of UNESCO at www.unesco.org.

[324] Presently, there are more than 7500 educational institutions in 175 countries taking part in the network.

2.2.5. *The Recommendation on the Development of Adult Education*[325]

The *Recommendation on the Development of Adult Education* was adopted by the General Conference of UNESCO in 1976.[326] It goes back to the initiative of the Third International Conference on Adult Education, held at Tokyo, Japan from 25 July to 7 August 1972, which had recommended to UNESCO the adoption of an instrument on adult education. The Recommendation is the first international instrument on the subject matter. As envisaged by article 23 ICESCR, the Recommendation constitutes international action for the achievement of article 13 ICESCR. The Recommendation contributes to giving content to article 13(2)(d) ICESCR, which requires that fundamental education be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education.[327] The Recommendation's scope goes beyond article 13(2)(d) ICESCR, however, as it covers not only adult education which replaces initial education, but also adult education beyond such education.

In its preamble, the Recommendation refers to articles 26 and 27 UDHR on the rights to education and to participate freely in cultural life, respectively, and to articles 13 and 15 ICESCR, protecting the same rights. Member states are called upon to take whatever legislative or other steps may be required to give effect to the Recommendation. They are further urged to bring the Recommendation to the attention of the authorities responsible for adult education and of the various organisations carrying out educational work for the benefit of adults.

Section 1 Recommendation provides a definition of the term "adult education":

> [T]he term "adult education" denotes the entire body of organised educational processes, whatever the content, level and method, whether formal or otherwise, whether they prolong or replace initial education in schools, colleges and universities as well as in apprenticeship, whereby persons regarded as adult by the society to which they belong develop their abilities, enrich their knowledge, improve their technical or professional qualifications or turn them in a new direction and bring about changes in their attitudes or behaviour in the twofold perspective of full personal development and participation in balanced and independent social, economic and cultural development . . .[328]

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[325] The text of the Recommendation is available at www.unesco.org.

[326] On the Recommendation on the Development of Adult Education, see Marks, 1977, p. 47 and Gebert, 1996, pp. 89–90. See also the two reports prepared by UNESCO for consideration by the Committee on Economic, Social and Cultural Rights, contained in UN Docs. E/1982/10, p. 17 and E/1988/7, pp. 10 *et seq.*

[327] See Gebert, 1996, p. 90.

[328] Fig. I, sect. 1 Recommendation.

Section 1 further stresses that adult education must not be considered as an entity in itself, but as an integral part of lifelong education.[329]

Figure II (sections 2 to 8) Recommendation is entitled "Objectives and Strategy". Section 2 defines the aims of adult education. Aims are, for example, that it should contribute to promoting work for peace, international understanding and co-operation, developing a critical understanding of major contemporary problems, promoting respect for the natural and cultural environment, creating respect for the diversity of cultures, promoting solidarity at the family, local, national, regional and international levels, developing the aptitude for acquiring new knowledge, qualifications, attitudes or forms of behaviour, ensuring the individual's conscious and effective incorporation into working life and developing the aptitude for learning to learn.[330] Section 3 outlines a number of principles on which adult education should be based. It is, for instance, stated that adult education should be based on the needs of participants, that it should rely on the ability of human beings to make progress throughout their lives, that it should awaken an interest in reading, that it should enlist the active participation of adult learners at all stages of the educational process and that it should be adapted to the actual conditions of everyday life and work.[331] The Recommendation then proceeds, in section 4(a), to recommend to member states that they should recognise adult education as a necessary component of their education system and as a permanent element in their development policy. Member states are called upon to promote the creation of structures, the preparation and implementation of programmes and the application of educational methods which meet the needs and aspirations of all categories of adults. The Recommendation further covers the following matters:

- the content of adult education (figure III, sections 9–23);
- methods, means, research and evaluation in the field of adult education (figure IV, sections 24–36);
- the structures of adult education (figure V, sections 37–40);
- the training and status of persons engaged in adult education work (figure VI, sections 41–45);
- the relations between adult education and youth education (figure VII, sections 46–48);
- the relations between adult education and work (figure VIII, sections 49–53);

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[329] In effect, adult education and education for children and adolescents are considered elements of a vision of education in which learning becomes lifelong.

[330] Sect. 2(a)–(g) and (k) Recommendation.

[331] Sect. 3(a)–(e) Recommendation.

- the management, administration, co-ordination and financing of adult education (figure IX, sections 54–60); and
- international co-operation in the field of adult education (figure X, sections 61–67).

Supervision of the Recommendation takes the form of consultations based on state reports, involving the Committee on Conventions and Recommendations.[332] The Fourth International Conference on Adult Education, held at Paris, France from 19 to 29 March 1985, had recommended to UNESCO that it should establish a procedure for the submission and consideration of reports of member states on the implementation of the Recommendation. In pursuance of that recommendation, the General Conference adopted 24 C/Resolution 2.7 in 1987, providing for the preparation of a questionnaire with a view to the drafting of state reports and further for the examination of such reports by the Committee on Conventions and Recommendations. The first consultation was subsequently conducted in accordance with 24 C/Resolution 2.7. In its report of 1993,[333] the Committee expressed its concern that almost two out of three member states had not replied to the questionnaire.[334] It further regretted that many obstacles, especially shortage of funds, still stood in the way of the development of adult education.[335] It noted, however, the following favourable developments concerning adult education:

- a broadening of the scope of adult education beyond literacy instruction;
- recognition of the place of adult education within the overall system of education;
- the inclusion of adult education programmes/projects in national development plans;
- a new awareness of the potential role of adult education in promoting the social integration of specific groups that are marginalised or economically disadvantaged, especially women, rural populations, young people and unemployed adults; and
- the reactivation of the concept of lifelong education.[336]

Reference must also be made to the *Hamburg Declaration on Adult Learning* and *Agenda for the Future*, adopted at the Fifth International Conference on

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[332] It has already been stated that art. VIII UNESCO Constitution lays down a general state reporting obligation concerning conventions and recommendations. See 6.2.1.4.1. *supra.*

[333] The Committee's report is contained in UNESCO Doc. 27 C/88 (1993).

[334] Fifty-nine member states had submitted reports. See UNESCO Doc. 27 C/88 (1993), para. 3.

[335] See *ibidem* at para. 22.

[336] See *ibidem* at para. 7.

Adult Education, convened by UNESCO and held at Hamburg, Germany from 14 to 18 July 1997. In paragraph 57 of the Agenda for the Future, the Conference recommends to UNESCO that it take appropriate steps to update the 1976 Recommendation. Underlying the recommendation is the appreciation that

> [d]uring the present decade, adult learning has undergone substantial changes and experienced enormous growth in scope and scale. In the knowledge-based societies that are emerging around the world, adult and continuing education have become an imperative in the community and at the workplace. New demands from society and working life raise expectations requiring each and every individual to continue renewing knowledge and skills throughout the whole of his or her life.[337]

The Declaration stresses that literacy, conceived as the basic knowledge and skills needed by all in a rapidly changing world, is a fundamental human right and that, hence, there should be a renewed commitment to ensure opportunities for all to acquire and maintain literacy skills.[338] It is emphasised that recognition of the right to learn throughout life is more than ever a necessity, the right being described as "the right to read and write, the right to question and analyse, the right to have access to resources, and to develop and practise individual and collective skills and competences".[339] The Declaration, and this is commendable, states that adult education should reflect the richness of cultural diversity and respect traditional knowledge and systems of learning, and further that the right to learn in the mother tongue should be respected and implemented.[340] Another positive feature of the Declaration is its specific reference to the right to adult education of women, indigenous peoples and disabled persons.[341]

3. *Instruments of the International Labour Organisation (ILO)*[342]

3.1. *Introductory Remarks Concerning the ILO*[343]

Also the ILO has prepared legal instruments which are relevant to the right to education. The ILO was created by the Paris Peace Conference

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[337] Hamburg Declaration on Adult Learning, para. 8.
[338] See *ibidem* at para. 11.
[339] See *ibidem* at para. 12.
[340] See *ibidem* at para. 15.
[341] See *ibidem* at paras. 13, 18 and 22.
[342] The texts of instruments of the International Labour Organisation (ILO) are available on the website of the Organisation (www.ilo.org).
[343] On the protection of human rights by the ILO, see, for example, chapter 12 by Samson, K. and K. Schindler, "The standard-setting and supervisory system of the ILO",

under Part XIII of the Treaty of Versaille in 1919, the Conference drafting the *Constitution of the International Labour Organisation*.[344] The ILO headquarters are located in Geneva, Switzerland. On 14 December 1946, the ILO was brought into relationship with the UN as a Specialised Agency.[345]

The ILO consists of three organs, a General Conference of representatives of member states, a Governing Body and an International Labour Office.[346] The organisation is composed of a unique tripartite structure involving governments, workers and employers.[347]

The primary function of the ILO is to improve the conditions of labour in its member states.[348] To this end, its activities include the formulation and enforcement of international labour standards. The ILO Constitution, in article 19(1), provides for the adoption of conventions and recommendations. Conventions create legal obligations for member states which have ratified them.[349] Recommendations, like unratified conventions, are of lesser legal significance.[350] They set out guidelines which should orient national policy and action.

ILO member states have two distinct legal obligations with regard to conventions and recommendations adopted by the General Conference. Firstly, they must submit conventions and recommendations to their competent national authorities within twelve to eighteen months of adoption, so that the national authorities may enact legislation or take other action.[351] Secondly, member states must submit reports on ILO instruments. Under article 22 ILO Constitution, member states which have ratified conventions are required to make an annual report on measures taken to give effect to them. Under article 19, member states are required to make

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in: R. Hanski and M. Suksi (eds.), *An Introduction to the International Protection of Human Rights: A Textbook*, second edition, Åbo: Institute for Human Rights (Åbo Akademi University), 1999.

[344] The text of the Constitution of the International Labour Organisation is available on the ILO's website.

[345] This was effected by UNGA Resolution 50(I). See note 5 *supra*.

[346] Art. 2 ILO Constitution.

[347] The *General Conference* is composed of four representatives of each member state, of whom two are government delegates and the two others delegates representing respectively employers and workers of each member state (art. 3(1) ILO Constitution). The *Governing Body* is composed of fifty-six persons, twenty-eight representing governments, fourteen representing employers and fourteen representing workers (art. 7(1) ILO Constitution). The *International Labour Office* is composed of a Director-General and staff (arts. 8 and 9 ILO Constitution).

[348] Art. 1(1) and the preamble of the ILO Constitution.

[349] Art. 19(5)(d) ILO Constitution.

[350] Art. 19(5)(e) and 19(6)(d) ILO Constitution state that "no further obligation shall rest upon the [Member]" with regard to unratified conventions and recommendations, respectively.

[351] Art. 19(5)(b) and 19(6)(b) ILO Constitution, regarding conventions and recommendations, respectively.

reports regarding unratified conventions and recommendations at intervals as requested by the Governing Body, setting out the position of their law and practice in regard to the matters dealt with in the convention or recommendation.[352] A Committee of Experts on the Application of Conventions and Recommendations, composed of twenty independent experts, has been established by the Governing Body to examine the reports. If the Committee concludes that a state does not comply with its obligations, it addresses a comment to that state, drawing attention to the shortcomings and requesting that steps be taken to eliminate them.[353]

The ILO has various further enforcement procedures. Articles 24 and 25 ILO Constitution provide for a "*representation procedure*". This procedure allows any organisation of employers or workers to make a representation to the effect that a member state has failed to secure in any respect the effective observance within its jurisdiction of any convention to which it is a party.[354] Articles 26 to 29 and 31 to 34 provide for a "*complaints procedure*". It grants to any member state the right to file a complaint if it is not satisfied that any other member state is securing the effective observance of any convention which both have ratified.[355]

There further exists a *special procedure concerning freedom of association*. It is considered that acceptance of the ILO Constitution implies an obligation to respect freedom of association. On that basis, a Committee on Freedom of Association, a tripartite committee of the Governing Body, has been established in 1951 to examine complaints from governments and employers' and workers' organisations to the effect that member states are not respecting freedom of association. The case law of the Committee is relevant to the interpretation of the right to education in as far as the latter covers the right of teaching staff that their material conditions be continuously improved, as laid down in article 13(2)(e) ICESCR. The *Digest*

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[352] Art. 19(5)(e) and 19(6)(d) ILO Constitution, regarding unratified conventions and recommendations, respectively.

[353] The Committee prepares a general report which is submitted to each annual session of the General Conference, where it is examined and discussed by a tripartite Conference Committee on the Application of Conventions and Recommendations. The Conference Committee itself prepares a report which, once adopted by the General Conference, is dispatched to governments.

[354] The Governing Body sets up a tripartite committee to examine the matter. The committee reports to the Governing Body, describing the steps taken to examine the representation and giving its conclusions and recommendations for decisions to be taken by the Governing Body. The Governing Body then finally decides the matter.

[355] The Governing Body may appoint a Commission of Inquiry to consider the complaint (art. 26(3) ILO Constitution). When the Commission of Inquiry has considered the complaint, it prepares a report embodying its findings and containing recommendations as to the steps which should be taken to meet the complaint (art. 28). The report is communicated to the Governing Body and to the governments concerned (art. 29(1)). Either party may further refer the complaint to the International Court of Justice (art. 29(2)).

of Decisions of 1996, which summarises the Committee's decisions up to that date, states, for example:

> The Committee has drawn attention to the importance of promoting collective bargaining, as set out in Article 4 of [the Right to Organise and Collective Bargaining Convention (1949) (ILO Convention No. 98)], in the education sector.[356]

However, it also states:

> The determination of the broad lines of educational policy is not a matter for collective bargaining between the competent authorities and teachers' organisations, although it may be normal to consult these organisations on such matters.[357]

The Digest also shows that the Committee considers teachers to be entitled to take strike action in support of their industrial demands, seeing that

> [t]he right to strike may [only] be restricted or even prohibited in the public service—public servants being those who exercise authority in the name of the State—or in essential services in the strict sense of the term, *i.e.* services the interruption of which would endanger the life, personal safety or health of the whole or part of the population.[358]

According to the Committee, however, teachers do not fall within the above definition of essential services[359] or public servants acting on behalf of the public authorities.[360] The post-1996 case law of the Committee on Freedom of Association essentially confirms the state of the law as reflected in the Digest.[361]

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[356] Digest of Decisions and Principles of the Freedom of Association Committee, 1996, para. 804.

[357] *Ibidem* at para. 813. Teachers have a right, however, to bargain collectively on the consequences on conditions of employment of decisions on educational policy. See, *e.g.*, *Complaint against the Government of Canada (Ontario) presented by the Canadian Labour Congress (CLC) and the Ontario Secondary School Teachers' Federation (OSSTF)*, Freedom of Association Committee (ILO), Case No. 1951, Report No. 311 (November 1998), paras. 216–220, Report No. 316 (June 1999), paras. 222–223 and Report No. 325 (June 2001), para. 206.

[358] Digest of Decisions and Principles of the Freedom of Association Committee, 1996, para. 536.

[359] Para. 545 Digest states that the education sector does not constitute an essential service in the strict sense of the term.

[360] Para. 535 Digest states that "[t]oo broad a definition of the concept of public servant is likely to result in a very wide restriction or even a prohibition of the right to strike for these workers. The prohibition of the right to strike in the public service should be limited to public servants exercising authority in the name of the State".

[361] See, *e.g.*, *Complaint against the Government of Japan presented by the Okayama Prefectural High-School Teachers' Union*, Freedom of Association Committee (ILO), Case No. 2114, Report No. 328 (June 2002), paras. 412–414 (the right of teachers to organise, and their right to bargain collectively their terms and conditions of employment, notwithstanding their special status under national law) and *Complaint against the Government of Togo presented by the*

3.2. *ILO Instruments Relevant to the Right to Education*

A number of legal instruments adopted by the ILO are relevant to the right to education. Firstly, the ILO has drafted instruments addressing education and vocational training. Furthermore, it has formulated instruments which seek to abolish child labour and to protect the child's right to education. Notable in this respect are the *Convention concerning Minimum Age for Admission to Employment* of 1973 and the *Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour* of 1999. The ILO has, moreover, adopted a *Convention concerning Indigenous and Tribal Peoples in Independent Countries* in 1989. Part VI of the Convention is devoted to the right to education of indigenous peoples. These three categories of instruments will be discussed in the following sections.

3.2.1. *ILO Instruments Relevant to Education and Vocational Training*

On 10 May 1944, the General Conference of the ILO adopted the *Declaration concerning the Aims and Purposes of the International Labour Organisation* at Philadelphia, USA. The Declaration is also known as the "Declaration of Philadelphia". Principle III(j) thereof recognises the obligation of the ILO to further among the nations of the world programmes which will achieve "the assurance of equality of educational and vocational opportunity". The Declaration was incorporated into the ILO Constitution in 1944. Provisions on education and vocational training are further contained in the *Convention concerning Basic Aims and Standards of Social Policy* of 1962.[362] Article 14(1)(d) of the Convention states that it must be an aim of policy to abolish all discrimination among workers in respect of opportunities for vocational training. Article 15(1) then lays down the fundamental obligation of states parties that

> [a]dequate provision shall be made to the maximum extent possible under local conditions, for the progressive development of broad systems of education, vocational training and apprenticeship, with a view to the effective participation of children and young persons of both sexes for a useful occupation.

The provision refers to the progressive nature of states parties' obligations in realising systems of education, vocational training and apprenticeship. At the same time, however, it emphasises that states parties must take steps

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National Union of Independent Trade Unions of Togo (UNSIT), Freedom of Association Committee (ILO), Case No. 2148, Report No. 327 (March 2002), para. 800 (the right of teachers to strike).

[362] Convention concerning Basic Aims and Standards of Social Policy (1962) (ILO Convention No. 117) (interim status).

"to the maximum extent possible", thus making a lax approach of states parties unacceptable.

The ILO has also adopted the following conventions and recommendations relevant to education and vocational training:

- the *Discrimination (Employment and Occupation) Convention* (1958) (No. 111)[363] (supplemented by *Recommendation* No. 111);
- the *Paid Educational Leave Convention* (1974) (No. 140)[364] (supplemented by *Recommendation* No. 148);
- the *Human Resources Development Convention* (1975) (No. 142)[365] (supplemented by *Recommendation* No. 195);[366] and
- the *Vocational Rehabilitation and Employment (Disabled Persons) Convention* (1983) (No. 159)[367] (supplemented by *Recommendation* No. 168).

The available space does not allow for a discussion of the said instruments. Suffice it to state that these instruments constitute international action, as envisaged by article 23 ICESCR, for the achievement of article 13(2) ICESCR, which concerns the various levels of education, and which refers to vocational education specifically in subparagraph (b).

3.2.2. *Abolishing Child Labour and Protecting the Right to Education: The Minimum Age Convention, 1973, and the Worst Forms of Child Labour Convention, 1999*

A discussion of the child's right to be protected from performing child labour and of how that right relates to the child's right to education should proceed from the provisions of article 32 CRC.[368] The said article states:

> 1. States Parties recognise the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.

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[363] Convention concerning Discrimination in Respect of Employment and Occupation (1958) (ILO Convention No. 111). Pursuant to the definition in art. 1(3) Convention, the terms "employment" and "occupation" include *inter alia* access to vocational training.

[364] Convention concerning Paid Educational Leave (1974) (ILO Convention No. 140).

[365] Convention concerning Vocational Guidance and Vocational Training in the Development of Human Resources (1975) (ILO Convention No. 142).

[366] The Recommendation concerning Human Resources Development: Education, Training and Lifelong Learning (2004) (No. 195) has revised the earlier Recommendation concerning Vocational Guidance and Vocational Training in the Development of Human Resources (1975) (No. 150).

[367] Convention concerning Vocational Rehabilitation and Employment (Disabled Persons) (1983) (ILO Convention No. 159).

[368] A publication which is relevant to the present discussion is Melchiorre, A., *At What Age? . . . Are School-Children Employed, Married and Taken to Court?* Second edition, Right to Education Project, 2004 (Right to Education Project, public access human rights resource, www.right-to-education.org).

> 2. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular:
>   (a) provide for a minimum age or minimum ages for admission to employment;
>   (b) provide for appropriate regulation of the hours and conditions of employment;
>   (c) provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article.[369]

Child labour must be considered an unacceptable practice for a variety of reasons. Article 32(1) refers to some of them. Amongst others, it is pointed out that child labour usually interferes with the child's education.[370] Conversely, it is commonly agreed that education is one of the principal means of preventing and eliminating child labour.[371] Article 32(2) obliges states parties to take measures to protect children from performing child labour. In this respect, states parties are instructed to have regard to "the relevant provisions of other international instruments". In practice, this means essentially the instruments adopted by the ILO on the topic.

Throughout the history of the ILO, it has been a major concern of the organisation that the minimum age for admission to employment should be closely related to the age when compulsory education is completed. The fixing of a higher age for admission to employment means that children who have finished their studies are unable to legally perform any work. A lower age may cause many children to abandon their studies.[372] On that premise, the ILO has adopted various conventions,[373] supplemented by

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[369] See also art. 10(3) ICESCR, which states, ". . . Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law".

[370] Para. 55 of the CESCR's General Comment No. 13 (Twenty-First Session, 1999) [UN Doc. E/2000/22] The right to education (art. 13 ICESCR) [*Compilation*, 2004, pp. 71–86], therefore, emphasises that "[s]tates parties have an obligation to ensure that communities and families are not dependent on child labour".

[371] Para. 55 of General Comment No. 13 (see note *supra*), therefore, affirms the importance of education in eliminating child labour.

[372] See in this regard art. 15(2) and (3) Convention concerning Basic Aims and Standards of Social Policy (1962) (ILO Convention No. 117) (interim status). Art. 15(2) states, "National laws or regulations shall prescribe the school-leaving age and the minimum age for and conditions of employment". Art. 15(3) then proceeds to state, "In order that the child population may be able to profit by existing facilities for education and in order that the extension of such facilities may not be hindered by a demand for child labour, the employment of persons below the school-leaving age during the hours when the schools are in session shall be prohibited in areas where educational facilities are provided on a scale adequate for the majority of the children of school age".

[373] See the *Minimum Age (Industry) Convention* (1919) (ILO Convention No. 5), revised 1937 (No. 59), the *Minimum Age (Sea) Convention* (1920) (ILO Convention No. 7), revised 1936

recommendations, which address the subject of minimum age for employment for diverse sectors of the economy. In 1973, the ILO adopted the *Convention concerning Minimum Age for Admission to Employment.*[374] The Convention is supplemented by a *Recommendation* bearing the same name.[375] The Convention is intended as a general instrument on minimum age for employment to be applied to all sectors of activity. In the preamble, it is stated that the Convention should gradually replace the existing conventions applicable to limited economic sectors, "with a view to achieving the total abolition of child labour". The Convention has been identified to be one of the ILO's fundamental conventions.[376]

Article 1 of the Convention obliges states parties "to pursue a national policy designed to ensure the effective abolition of child labour and to raise progressively the minimum age for admission to employment or work to a level consistent with the fullest physical and mental development of young persons". Section 2(d) of the Recommendation states with regard to the content of the policy that special attention should be given to areas, such as "the development and progressive extension of adequate facilities for education and vocational orientation and training appropriate in form and content to the needs of the children and young persons concerned". It is important that states parties co-ordinate their national policy concerning child labour with their education and training policy. Education and training objectives must be taken into account when determining national policy regarding child labour.

The Convention sets a number of minimum ages depending on the type of employment or work:

(No. 58), the *Minimum Age (Agriculture) Convention* (1921) (ILO Convention No. 10), the *Minimum Age (Non-Industrial Employment) Convention* (1932) (ILO Convention No. 33), revised 1937 (No. 60) [ILO Convention No. 60 has meanwhile been shelved], the *Minimum Age (Fishermen) Convention* (1959) (ILO Convention No. 112) and the *Minimum Age (Underground Work) Convention* (1965) (ILO Convention No. 123).

[374] Convention concerning Minimum Age for Admission to Employment (1973) (ILO Convention No. 138) 1015 UNTS 297, entered into force on 19 June 1976.

[375] Recommendation concerning Minimum Age for Admission to Employment (1973) (No. 146).

[376] Eight ILO conventions have been identified by the ILO's Governing Body as being fundamental to the rights of human beings at work, irrespective of the levels of development of individual member states. The conventions are the following: the *Freedom of Association and Protection of the Right to Organise Convention* (1948) (ILO Convention No. 87), the *Right to Organise and Collective Bargaining Convention* (1949) (ILO Convention No. 98), the *Forced Labour Convention* (1930) (ILO Convention No. 29), the *Abolition of Forced Labour Convention* (1957) (ILO Convention No. 105), the *Discrimination (Employment and Occupation) Convention* (1958) (ILO Convention No. 111), the *Equal Remuneration Convention* (1951) (ILO Convention No. 100), the *Minimum Age Convention* (1973) (ILO Convention No. 138) and the *Worst Forms of Child Labour Convention* (1999) (ILO Convention No. 182).

- States parties must specify a minimum age for admission to employment or work (article 2(1)) which may not be less than the age of completion of compulsory schooling and, in any case, not less than 15 years (article 2(3)). States parties whose economy and educational facilities are insufficiently developed may initially specify a minimum age of 14 years (article 2(4)). Article 2 appears to imply that education should be compulsory, at least, until the child reaches the age of 15. Compulsory education thus construed would cover the period of primary and that of "lower secondary education" (the seventh to the ninth year of schooling). This rendering of compulsory education should be endorsed.[377]
- The minimum age for admission to hazardous employment or work[378] may not be less than 18 years (article 3(1)). The types of employment or work deemed to be hazardous are left to be determined by the laws or regulations or by the competent authority of the individual countries (article 3(2)).[379]
- National laws or regulations may permit the employment or work of persons not less than 13 years of age, 12 years in the case of states parties whose economy and educational facilities are insufficiently developed, on "light work" (article 7(1) and (4), respectively). "Light work" means work which is (a) not likely to be harmful to the health or development of children and (b) not such as to prejudice their attendance at school, their participation in vocational orientation or training programmes or their capacity to benefit from the instruction received (article 7(1)).[380] The competent authority must determine the activities in which employment or work may be permitted and must prescribe the number of hours during which and the conditions in which such employment or work may be undertaken (article 7(3)). Section 13(1)(b) Recommendation requires in this regard that special attention must be given to "the strict limitation of the hours spent at work in a day and in a week, and the prohibition

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[377] See also 10.4.3.2. *infra.*

[378] Art. 3(1) Minimum Age Convention speaks of "any type of employment or work which by its nature or the circumstances in which it is carried out is likely to jeopardise the health, safety or morals of young persons".

[379] Note should, however, be taken of art. 3(3) Minimum Age Convention, which provides that states parties may, after consultation with organisations of employers and workers, authorise employment or work as from the age of 16 years on condition that "the health, safety and morals of the young persons concerned are fully protected and that the young persons have received adequate specific instruction or vocational training in the relevant branch of activity".

[380] Examples of work considered as light are included in sect. I(2) of the *Recommendation concerning the Age for Admission of Children to Non-Industrial Employment* (1932) (No. 41), namely, "such occupations and employments as running errands, distribution of newspapers, odd jobs in connection with the practice of sport or the playing of games, and picking and selling flowers or fruits".

> of overtime, so as to allow enough time for education and training (including the time needed for homework related thereto), for rest during the day and for leisure activities".[381]

Concerning the enforcement of the Convention, article 9 obliges states parties to take "all necessary measures, including the provision of appropriate penalties". Among these measures, particular mention should be made of the strengthening of labour inspection services, for example, by training inspectors to detect and remedy abuse with regard to child labour. Section 14(3) Recommendation states generally that the labour administration services should work in close co-operation with the services responsible for the education, training, welfare and guidance of children and young persons. Finally, teachers should be the focus of special attention, especially those who are responsible for children reaching particularly vulnerable ages.

The Minimum Age Convention does not intend to prescribe minimum standards in a static fashion. The underlying rationale of the Convention is that standards should be progressively improved. There should be sustained action to attain the objectives of the Convention. Many states initially considered the Convention to be too inflexible and complex to be ratified. This perception has changed, however. In May 1995, the Director-General of the ILO launched a campaign to achieve universal ratification of the ILO's fundamental conventions. Since then the number of ratifications of the Minimum Age Convention has increased significantly. At present, it stands at 135.[382] The Committee of Experts on the Application of Conventions and Recommendations has recently remarked:

> The Committee hopes that governments will continue endorsing this instrument, to determine and guide their policies in combating child labour, whatever form it takes; strengthening their education and social support systems so that children who have access to school can remain there and complete, at the very least, their compulsory education; establishing and maintaining support programmes for children who are released from work; and consoli-

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[381] For the sake of completeness, reference should further briefly be made to arts. 4 and 5 Minimum Age Convention. Art. 4 provides that, in so far as necessary, states parties may exclude from the application of the Convention "limited categories of employment or work in respect of which special and substantial problems of application arise". The "limited categories of employment or work" are not defined in the Convention. During the preparatory work, reference was made to employment in family undertakings, domestic service in private households and some types of work carried out without the employer's supervision. Art. 5 provides that states parties whose economy and administrative facilities are insufficiently developed may initially limit the scope of application of the Convention, by specifying the branches of economic activity or types of undertakings to which the Convention will apply.

[382] This figure is shown on the website of the ILO (www.ilo.org) on 12 January 2005.

dating their employment programmes for adults, which benefit the workers' children.[383]

The other basic ILO convention on the topic of child labour is the *Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour* of 1999.[384] Like the Minimum Age Convention, it is one of the ILO's fundamental conventions.[385] It is supplemented by a *Recommendation* bearing the same name.[386] The Convention must be seen as complementing the Minimum Age Convention.[387] It prohibits particularly severe forms of child labour[388] and defines a child for this purpose as a person under the age of 18.[389] One of the beneficial effects of prohibiting "the worst forms of child labour" is that this protects the educational rights of children. This is true for both children who have not yet completed their compulsory schooling and for those who wish to pursue further studies.

Article 1 Convention instructs states parties to "take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency". In article 7(2), the Convention emphasises the importance of education in eliminating child labour. States parties must attend to children removed from the worst forms of child labour. Article 7(2)(c) directs them to ensure to such children "access to free basic education, and, wherever possible and appropriate vocational training".[390]

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[383] General Report of the Committee of Experts on the Application of Conventions and Recommendations, 2001, para. 160.

[384] Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (1999) (ILO Convention No. 182), entered into force on 19 November 2000. The Convention has been ratified by 150 ILO member states—this figure is shown on the website of the ILO (www.ilo.org) on 12 January 2005—and stands out as the convention with the fastest pace of ratification in ILO history.

[385] See note 376 *supra*.

[386] Recommendation concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (1999) (No. 190).

[387] The second preambular paragraph refers to the need to adopt new instruments on the worst forms of child labour to complement the Minimum Age Convention.

[388] Art. 3 Worst Forms of Child Labour Convention defines "the worst forms of child labour" as comprising "(a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict; (b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances; (c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs . . .; (d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children".

[389] Art. 2 Worst Forms of Child Labour Convention.

[390] Sect. 15 Worst Forms of Child Labour Recommendation suggests that measures aimed at the prohibition and elimination of the worst forms of child labour might include *inter alia* "adopting appropriate measures to improve the educational infrastructure and the training of teachers to meet the needs of boys and girls" (sect. 15(j)) and "the need for job

In the past few years, the international community has become more aware of the urgent need to address the problem of child labour and of the role that education can, and indeed should, play in this regard.[391] An International Conference on Child Labour was therefore convened at Oslo, Norway from 27 to 30 October 1997 by the Norwegian government in co-operation with the ILO and UNICEF.[392] The Conference adopted an *Agenda for Action*,[393] which recognises in paragraph 1.7:

> Education, particularly basic education, is one of the principal means of preventing and eliminating child labour. Children outside the school system are vulnerable to various forms of exploitation, particularly to economic exploitation such as child labour. Child workers or potential child workers and the flow of children into work can be stemmed by establishing a system of accessible, relevant, high-quality, universal, compulsory basic education that is free for all.

Under the title "Education", the Agenda reaffirms the child's right to education and stresses that all work which interferes with the child's education must be regarded as unacceptable.[394] States are called upon to "[f]ormulate and implement a time-bound programme for universal compulsory basic education free for all that will ensure the necessary quality and relevance, as a central component of [a] national plan of action".[395] States should further take measures to eliminate discrimination in education and ensure equal education opportunities for women.[396] Job training programmes should be developed within the general framework of public education.[397] Vocational training opportunities and apprenticeship programmes should be created for children above school age.[398] It is also emphasised that,

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creation and vocational training for the parents and adults in the families of children working in the conditions covered by the Convention" (sect. 15(i)).

[391] Note should, for example, be taken of the ILO's International Programme on the Elimination of Child Labour (IPEC) and its activities in the field. For more information on the programme, see its website at www.ilo.org/public/english/standards/ipec/index.htm.

[392] The Oslo Conference succeeded the Amsterdam Child Labour Conference, held at Amsterdam, the Netherlands, from 26–27 February 1997, which had adopted a *Declaration on the Elimination of the Most Intolerable Forms of Child Labour*.

[393] The text of the Agenda for Action has been reproduced in Bjerkan, L. and C. Gironde, *Achievements and Setbacks in the Fight against Child Labour: Assessment of the Oslo Conference on Child Labour, October 27–30, 1997*, Norway: Fafo Institute for Applied Social Sciences, 2004 (Fafo Research Programme on Trafficking and Child Labour) (Fafo Report No. 439).

[394] Agenda for Action, para. 3.18.

[395] *Ibidem* at para. 3.19. It is stated that "[t]his programme should encompass comprehensive policies indicating the current percentage of GNP allotted to basic education, a target percentage for future allocations, and plans for improvement of education in terms of scope, quality and relevance. Laws and regulations to ensure that all children have access to education are required".

[396] Agenda for Action, paras. 3.20–3.21.

[397] *Ibidem* at para. 3.22.

[398] *Ibidem* at para. 3.23.

wherever possible, working children should be integrated into the formal education system.[399]

3.2.3. *Ensuring Indigenous Peoples' Right to Education: The Indigenous and Tribal Peoples Convention, 1989*

About 370 million people in the world belong to so-called indigenous peoples. Notable examples are the Indians of North and South America, the Aborigine of Australia, the Maori of New Zealand and the Saami of Scandinavia.

In 1957, the ILO adopted the *Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries*.[400] At the time, the Convention was the only international instrument which in its entirety and explicitly addressed the rights of indigenous peoples. The Convention envisages the protection of indigenous peoples by means of their assimilation—which it terms "integration"—into the national community of the country in which they live. The fifth preambular paragraph of the Convention provides that

> there exist in various independent countries indigenous and other tribal and semi-tribal populations which are not yet integrated into the national community and whose social, economic or cultural situation hinders them from benefiting fully from the rights and advantages enjoyed by other elements of the population.

The Convention contains provisions regulating the living and working conditions of indigenous peoples, such as provisions on rights to land, conditions of employment, social security, health and education.

The Convention was subsequently subjected to severe criticism for its paternalistic and assimilationist stance, especially by indigenous peoples themselves. They argued that the Convention provided insufficient opportunity for representatives of the peoples to participate in the formulation of policy on indigenous issues. They further complained that the Convention

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[399] *Ibidem* at para. 3.24.

[400] Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (1957) (ILO Convention No. 107) (outdated). In terms of art. 1, the Convention applies to "(a) members of tribal or semi-tribal populations in independent countries whose social and economic conditions are at a less advanced stage than the stage reached by the other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations; (b) members of tribal or semi-tribal populations in independent countries which are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation and which, irrespective of their legal status, live more in conformity with the social, economic and cultural institutions of that time than with the institutions of the nation to which they belong".

was not in accordance with the more enlightened perceptions of the 1970s and 80s, which emphasised identity, autonomy and self-determination. This led to the Convention being revised.[401] In 1989, the ILO adopted the *Convention concerning Indigenous and Tribal Peoples in Independent Countries*.[402] Whereas Convention No. 107 uses the term "indigenous populations", Convention No. 169 speaks of "indigenous peoples".[403] In international law, the term "peoples" has a meaning in relation to the right to self-determination. At the time of drafting Convention No. 169, governmental representatives, accordingly, rejected its use in the Convention. The representatives of indigenous peoples, however, insisted on its use. In the end, it was decided to use the term, but to provide in article 1(3) that "[t]he use of the term 'peoples' in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law".[404] Convention No. 169 clearly distances itself from the notion of integration permeating Convention No. 107. The fourth preambular paragraph of Convention No. 169 refers to "developments which have

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[401] A further factor which prompted the revision of the Convention were the findings of José R. Martínez Cobo, Special Rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, appointed in 1971 to study the situation of indigenous peoples. See the Special Rapporteur's report of 1986, Martínez Cobo, J., *Study of the Problem of Discrimination Against Indigenous Populations* (UN Doc. E/CN.4/Sub.2/1986/7 and Adds.1–4, Vol. V), New York: UN, 1987 (UN Sales No. E.86.XIV.3). See also the discussion at 4.12. *supra* in this regard.

[402] Convention concerning Indigenous and Tribal Peoples in Independent Countries (1989) (ILO Convention No. 169) 328 UNTS 247, entered into force on 5 September 1991. On the protection of the right to education by the Convention, see Coomans, 1992, pp. 148–152 and Hodgson, 1998, pp. 121–126. Ratification of Convention No. 169 involves the immediate denunciation of Convention No. 107 (art. 36(1)(a) Convention No. 107). Convention No. 107 ceased to be open to ratification in 1991, when Convention No. 169 came into force (art. 36(1)(b) Convention No. 107). So far, merely seventeen states have ratified Convention No. 169. This figure is shown on the website of the ILO (www.ilo.org) on 12 January 2005.

[403] In terms of art. 1 Convention No. 169, the Convention applies to "(a) Tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations; (b) Peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions".

[404] The Committee of Experts on the Application of Conventions and Recommendations has remarked in this regard, "One of the fundamental precepts of [Convention No. 169] is that a relationship of respect should be established between indigenous and tribal peoples and the States in which they live, a concept which should not be confused with autonomy or political and territorial independence from the nation State". See General Report of the Committee of Experts on the Application of Conventions and Recommendations, 1999, para. 100.

taken place in international law since 1957 . . . [which] have made it appropriate to adopt new international standards . . . with a view to removing the assimilationist orientation of the earlier standards". The fifth preambular paragraph recognises

> the aspirations of [indigenous peoples] to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live.

In the discussion which follows, the provisions of Conventions Nos. 107 and 169, which correspond to each other, will be juxtaposed, to highlight the new features of Convention No. 169. First of all, some of the general provisions of the conventions will be briefly dealt with. This is followed by a short analysis of the provisions on education of the conventions.

General provisions:

ILO Convention No. 107	ILO Convention No. 169
Article 2	Article 2
1. Governments shall have the primary responsibility for developing co-ordinated and systematic action for the protection of the populations concerned and their progressive integration into the life of their respective countries.	1. Governments shall have the responsibility for developing, with the participation of the peoples concerned, co-ordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity.
Article 3	Article 4
1. So long as the social, economic and cultural conditions of the populations concerned prevent them from enjoying the benefits of the general laws of the country to which they belong, special measures shall be adopted for the protection of the institutions, persons, property and labour of these populations.	1. Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned.

Under article 2(1) Convention No. 107, the obligation of states parties is to work towards the progressive integration of indigenous peoples into the national community of the country in which they live. For as long as integration has not been achieved, special measures must be taken, in terms of article 3(1), for their protection. Under article 2(1) Convention No. 169, the obligation of states parties is directed at the protection of *the rights* of indigenous peoples. Unlike Convention No. 107, Convention No. 169 pro-

vides for the participation of indigenous peoples in the process. Special measures of protection, "as appropriate", are required in terms of article 4(1). These are no longer understood as temporary measures. The words "as appropriate", however, make it possible for states parties to evade their duties in this regard.[405]

Provisions on education: "Part VI. Education and Means of Communication" of both conventions:

ILO Convention No. 107	ILO Convention No. 169
Article 21	Article 26
Measures shall be taken to ensure that members of the populations concerned have the opportunity to acquire education at all levels on an equal footing with the rest of the national community.	Measures shall be taken to ensure that members of the peoples have the opportunity to acquire education at all levels on at least an equal footing with the rest of the national community.

Article 26 Convention No. 169 essentially repeats the terms of article 21 Convention No. 107, inserts, however, the words "at least" before "an equal footing with the rest of the national community". The insertion of these words implicitly endorses the use of affirmative action measures to advance the educational situation of indigenous peoples.[406]

ILO Convention No. 107	ILO Convention No. 169
Article 22	Article 27
1. Education programmes for the populations concerned shall be adapted, as regards methods and techniques, to the stage these populations have reached in the process of social, economic and cultural integration into the national community. 2. The formulation of such programmes shall normally be preceded by ethnological surveys.	1. Education programmes and services for the peoples concerned shall be developed and implemented in co-operation with them to address their special needs, and shall incorporate their histories, their knowledge and technologies, their value systems and their further social, economic and cultural aspirations. They shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly. 2. The competent authority shall ensure the training of members of these peoples and their involvement in the for-

[405] See Coomans, 1992, p. 150.
[406] See Hodgson, 1998, p. 124.

> mulation and implementation of education programmes, with a view to the progressive transfer of responsibility for the conduct of these programmes to these peoples as appropriate.
> 3. In addition, governments shall recognise the right of these peoples to establish their own educational institutions and facilities, provided that such institutions meet minimum standards established by the competent authority in consultation with these peoples. Appropriate resources shall be provided for this purpose.

Article 22 Convention No. 107 proceeds from the view that indigenous peoples have not yet reached an advanced stage of social, economic and cultural development. It requires education programmes for indigenous peoples to be adapted to the stage of development of indigenous peoples. The tone of the provision is quite paternalistic. In fact, it considers indigenous peoples to be inferior to the rest of the national community. Article 27 Convention No. 169 is novel in various respects.[407] Firstly, article 27(1) provides for the participation of indigenous peoples in the organisation of education. Under article 27(2), members of the peoples are to participate in the formulation and implementation of education programmes and must be trained for this purpose. Secondly, as stated by article 27(2), participation is aimed at the gradual transfer of responsibility for their education programmes to indigenous peoples. Thirdly, article 27(1) prescribes a general framework for the content of indigenous education programmes, referring, as it does, to the histories, knowledge, value systems and social, economic and cultural aspirations of indigenous peoples. In so doing, the provision seeks to contribute to the preservation of indigenous culture. Fourthly, article 27(3) grants to indigenous peoples the right to set up their own educational institutions. Unlike article 5(1)(c) CDE on the educational rights of members of national minorities, article 27(3) Convention No. 169 obliges states parties to provide appropriate resources to enable indigenous communities to establish their own educational institutions. The said institutions must meet minimum standards established by the competent authority *in consultation with the peoples*.

[407] See *ibidem* at pp. 124–125.

ILO Convention No. 107	ILO Convention No. 169
Article 23	Article 28
1. Children belonging to the populations concerned shall be taught to read and write in their mother tongue or, where this is not practicable, in the language most commonly used by the group to which they belong. 2. Provision shall be made for a progressive transition from the mother tongue or the vernacular language to the national language or to one of the official languages of the country. 3. Appropriate measures shall, as far as possible, be taken to preserve the mother tongue or the vernacular language.	1. Children belonging to the peoples concerned shall, wherever practicable, be taught to read and write in their own indigenous language or in the language most commonly used by the group to which they belong. When this is not practicable, the competent authorities shall undertake consultations with these peoples with a view to the adoption of measures to achieve this objective. 2. Adequate measures shall be taken to ensure that these peoples have the opportunity to attain fluency in the national language or in one of the official languages of the country. 3. Measures shall be taken to preserve and promote the development and practice of the indigenous languages of the peoples concerned.

Article 28(1) Convention No. 169, like article 23(1) Convention No. 107, requires that indigenous children be taught to read and write in their own indigenous language. It is deplorable, however, that article 28(1) Convention No. 169 does not go so far as to generally recognise the right of indigenous children to education *in* their own language. Education *in* the mother tongue is necessary to acquire fluency in that language and to effectively protect indigenous culture. A further cause of concern is the use in article 28(1) of the words "wherever practicable" to qualify the state's obligation. It has been stated in this respect:

> This is no "hard" obligation for the states and offers an insufficient guarantee for the indigenous peoples themselves.[408]

Whereas article 23(2) Convention No. 107 reflects the general goal of integration by providing for the progressive transition from the mother tongue to the national language, article 28(2) Convention No. 169 merely requires that adequate measures be taken to ensure that indigenous peoples have the opportunity to attain fluency in the national language. Unlike the latter provision, the former contributes to the loss of indigenous culture.

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[408] Coomans, 1992, p. 151. Own translation from original Dutch text, "Dit is geen harde verplichting voor de staaten en biedt een onvoldoende garantie voor de inheemse volken self".

Finally, article 28(3) Convention No. 169 is similar to article 23(3) Convention No. 107. It goes a step further, however. It calls not only for measures to preserve the mother tongue, but also for measures to promote the development and practice of indigenous languages.

ILO Convention No. 107	ILO Convention No. 169
Article 24	Article 29
The imparting of general knowledge and skills that will help children to become integrated into the national community shall be an aim of primary education for the populations concerned.	The imparting of general knowledge and skills that will help children belonging to the peoples concerned to participate fully and on an equal footing in their own community and in the national community shall be an aim of education for these peoples.

Article 24 Convention No. 107 identifies as an aim of education the imparting of general knowledge and skills that will facilitate integration into the national community. By contrast, article 29 Convention No. 169 considers that general knowledge and skills must be imparted to help indigenous children to participate on an equal footing in their own community and in the national community.[409]

ILO Convention No. 107	ILO Convention No. 169
Article 25	Article 31
Educational measures shall be taken among other sections of the national community and particularly among those that are in most direct contact with the populations concerned with the object of eliminating prejudices that they may harbour in respect of these populations.	Educational measures shall be taken among all sections of the national community, and particularly among those that are in most direct contact with the peoples concerned, with the object of eliminating prejudices that they may harbour in respect of these peoples. To this end, efforts shall be made to ensure that history textbooks and other educational materials provide a fair, accurate and informative portrayal of the societies and cultures of these peoples.

The first sentence of article 31 Convention No. 169 essentially repeats article 25 Convention No. 107. Article 31 adds a second sentence, however, to the effect that efforts must be made to ensure that history textbooks

[409] See Hodgson, 1998, p. 125.

and other educational materials provide an accurate portrayal of indigenous peoples.[410]

In summary, Convention No. 169 constitutes a definite advance when compared with Convention No. 107. The rationale of Convention No. 107, namely, integration into the national community, is not encountered anymore in Convention No. 169. Convention No. 169 is based on ideas of self-government and the protection of cultural identity. Mention must, however, be made of article 7(1), which grants to indigenous peoples the right to exercise control over their own economic, social and cultural development only "to the extent possible". This and other similar claw-back clauses make it possible for states parties to evade their obligations under the Convention. In the end, it may thus legitimately be asked whether Convention No. 169, in fact, lays down *full-scale* obligations.[411]

Convention No. 169 had a significant impact on subsequent formulations of the rights of indigenous peoples. It influenced the Draft Declaration on the Rights of Indigenous Peoples approved by the Working Group on Indigenous Populations of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1994. In certain respects, the Draft Declaration is more progressive. It provides, for example, that education may be given *in* the indigenous language concerned and, further, does not require that the education in indigenous educational institutions conform to minimum standards established by the state.[412] Convention No. 169 also influenced the various versions of the Draft American Declaration on the Rights of Indigenous Peoples.[413]

The Committee of Experts on the Application of Conventions and Recommendations has recently examined the reports of states parties to Conventions Nos. 107 and 169. In conclusion of its examination of reports, the Committee stated that it remained concerned at the serious problems encountered by indigenous peoples. It noted that these peoples continued to be the most poorly educated in their respective countries. The Committee, however, also observed that "in almost all countries there is evidently a growing awareness of the need to address the situation of the indigenous and tribal peoples, as a matter of justice and as a prerequisite to national development".[414]

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[410] See *idem*.

[411] See also Coomans, 1992, p. 152. Berman, H., "The International Labour Organisation and Indigenous Peoples: Revision of ILO Convention No. 107 at the 75th Session of the International Labour Conference, 1988", in: *The Review (International Commission of Jurists)*, No. 41, 1988, pp. 48–58 is very critical of Convention No. 169.

[412] See 4.12. *supra*.

[413] See 5.3.4. *supra*.

[414] See General Report of the Committee of Experts on the Application of Conventions and Recommendations, 2004, paras. 24–28.

CHAPTER SEVEN

PROMOTING THE RIGHT TO EDUCATION AT THE INTERNATIONAL LEVEL

1. *Introduction*

The objective of this book is to write on the right to education as protected by international law, *i.e.* by the various international and regional legal instruments and the legal instruments adopted by UNESCO and the ILO as Specialised Agencies of the UN, and to analyse article 13 ICESCR in more depth (see Part B below). The discussion of the right to education would not be complete, however, if it did not additionally mention certain activities which have been or are currently being undertaken at the international level *to promote the right*—as such or within the broader context of global strategies aimed at addressing uncontrolled population growth, social problems, poverty and human rights concerns. The reference here is to international conferences and other initiatives notably of the UN and UNESCO, dealing with issues pertaining to the right to education, human rights and economic and social development. The discussion first provides *an overview* of the various activities at the international level. This is followed by a discussion of two initiatives, which the present writer considers particularly important within the framework of activities intended to advance the cause of the right to education. Firstly, there will be a short note on the so-called *Education for All (EFA) process*, which commenced in 1990 with the adoption of the World Declaration on Education for All by the World Conference on Education for All, held at Jomtien, Thailand. Secondly, a few words will be said on the activities of the *Special Rapporteur on the Right to Education*. This position was created in 1998 by the Commission on Human Rights, the Special Rapporteur's task being to report on and to suggest ways and means of improving the realisation of the right to education.

2. *An Overview of Activities at the International Level Promoting the Right to Education*

The overview which follows has been divided into three sections. The first section lists World Summits organised by the UN, the documents adopted

at the Summits and a succinct statement of the significance of each Summit or its documents for the right to education. The second section follows the same outline with regard to Intergovernmental Conferences organised by UNESCO or under its auspices. Documents adopted at Summits or Conferences are not legally binding, but they do bind as soft-law.[1] The third section lists various other activities at the international level relevant to the right to education.[2]

2.1. *World Summits Organised by the UN*[3]

• International Conference on Human Rights, • held at Teheran, Iran from 22 April to 13 May 1968, • adopts *Proclamation of Teheran*	Para. 14 *Proclamation* states, "The existence of over seven million illiterates throughout the world is an enormous obstacle to all efforts at realising the aims and purposes of the [UN Charter] and the provisions of the [UDHR]. International action aimed at eradicating illiteracy from the face of the earth and promoting education at all levels requires urgent attention".
• World Summit for Children, • held at New York, USA from 29 to 30 September 1990, • adopts *World Declaration on the Survival, Protection and Development of Children* and *Plan of Action for Implementing the World Declaration on the Survival, Protection and Development of Children in the 1990s*	Para. 13 *Declaration* points out that there are over 100 million children without basic schooling. Point 6 of the 10-point programme (para. 20) adopted at the Summit thus states that "[w]e will work for programmes that . . . provide educational opportunities for all children . . .". Para. 20 *Plan of Action* calls for measures

[1] Daudet and Singh, 2001, p. 46 state that "while the declarations, recommendations or frameworks for action adopted regarding the right to education may carry great political and moral weight, they are collectively and individually devoid of legal force". At pp. 42–48, Daudet and Singh explain that the soft-law effect of each declaration/recommendation/framework for action needs to be determined separately and that various factors, such as the voting conditions, the terms employed and the status of participants, are to be considered in this respect. Of frameworks for action, the authors say, at pp. 31–32, that they are guidelines for action, intended to stimulate discussion at the national level, and which states are free to follow or not.

[2] For an overview of activities at the international level promoting the right to education, see also Hodgson, 1998, pp. 32–37 and further UNICEF, 2000, p. 12.

[3] The texts of the documents adopted at the World Summits as from 1994 onwards are available on the website of the UN, "Conferences and Events", at www.un.org/events/index.html. The texts of the documents of the 1993 World Conference on Human Rights are available at www.ohchr.org and those of the documents of the 1990 World Summit for Children at www.unicef.org.

	to be adopted for universal access to basic education and completion of primary education by at least 80 per cent of the relevant school age children by the year 2000.
• World Conference on Human Rights, • held at Vienna, Austria from 14 to 25 June 1993, • adopts *Vienna Declaration* and *Programme of Action*	Para. 47 *Programme of Action* (in section 4 on "The rights of the child" of Part II, Division B) urges all nations to undertake measures to the maximum extent of their available resources, with the support of international co-operation, to achieve the goals in the Plan of Action of the World Summit for Children and to place particular priority on *inter alia* providing access to basic education.
• International Conference on Population and Development, • held at Cairo, Egypt from 5 to 13 September 1994, • adopts *Programme of Action*	Chapter XI "Education, Population and Development" *Programme of Action* calls for the achievement of universal access to quality primary and technical education for both girls and boys by the year 2015 (see paras. 11.5. and 11.6.).
• World Summit for Social Development, • held at Copenhagen, Denmark from 6 to 12 March 1995, • adopts *Declaration* and *Programme of Action*	In Commitment 6 *Declaration*, the participants commit themselves to promote and attain *inter alia* universal and equitable access to quality education to help eradicate poverty, promote employment and foster social integration.
• Fourth World Conference on Women, • held at Beijing, China from 4 to 15 September 1995, • adopts *Beijing Declaration* and *Platform for Action*	Para. 30 *Declaration* refers to the determination of the participants to ensure equal access to and equal treatment of women and men in education.
• Millennium Summit of the United Nations, • held at New York, USA from 6 to 8 September 2000, • adopts *UN Millennium Declaration*	Para. 19 *UN Millennium Declaration* states amongst others that by 2015 "children everywhere, boys and girls alike, will be able to complete a full course of primary schooling" and that "girls and boys will have equal access to all levels of education".
• World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance,	Paras. 95 and 97 *Declaration* recognise the essential role of education, including human rights education, in the prevention

• held at Durban, South Africa from 31 August to 8 September 2001, • adopts *Declaration* and *Programme of Action*	and eradication of all forms of intolerance and discrimination. Para. 96 states that ". . . quality education, the elimination of illiteracy and access to free primary education for all can contribute to more inclusive societies . . .". Subchapter III.A.3. *Programme of Action* addresses "Education and awareness-raising measures".[4]
• Special Session of the General Assembly on Children, • held at New York, USA from 8 to 10 May 2002, • adopts *Declaration* and *Plan of Action*	Para. 7 *Declaration* states amongst others that "[a]ll girls and boys must have access to and complete primary education that is free, compulsory and of good quality" and that "[g]ender disparities in primary and secondary education must be eliminated" (Principle 5). Paras. 38 to 40 *Plan of Action* address the provision of "quality education".
• World Summit on Sustainable Development, • held at Johannesburg, South Africa from 2 to 4 September 2002, • adopts *Johannesburg Declaration* and *Plan of Implementation*	Paras. 116 to 124 *Plan of Implementation* stress that education is critical for promoting sustainable development. To advance sustainable development, poverty must be eradicated, this requiring *inter alia* action to achieve universal primary education (para. 7(g) read with para. 116(a)). Further, by integrating sustainable development into education systems at all levels of education, education may become a key agent for change (para. 121).
• World Summit on the Information Society (first phase), • held at Geneva, Switzerland from 10 to 12 December 2003, • adopts *Declaration of Principles* and *Plan of Action*	Para. 29 *Declaration* recognises that everyone should have the opportunity to acquire the necessary skills to participate in the Information Society and the importance of universal primary education in this regard. Para. 11 *Plan of Action* points out that Information and Communication Technology literacy is essential today and, further, that such technology can, in fact, contribute to achieving universal education world-wide.

[4] Note may be taken of the following two background papers prepared for the Intergovernmental Working Group on the Effective Implementation of the Durban Declaration and Programme of Action: Fontani, P., *UNESCO's Action to Combat Racism and Discrimination through Education*, UN Doc. E/CN.4/2004/WG.21/BP.6 and Tomaševski, K., *Five Necessary Steps to Eliminate Racism and Xenophobia in Education, and through Education: Recommendations by the Special Rapporteur of the Commission on Human Rights on the Right to Education*, UN Doc. E/CN.4/2004/WG.21/BP.5.

2.2. *Intergovernmental Conferences Organised by UNESCO or Under Its Auspices*[5]

• World Conference on Education for All, • co-sponsored by UNDP, UNESCO, UNICEF, the World Bank and, later, UNFPA, • held at Jomtien, Thailand from 5 to 9 March 1990, • adopts *World Declaration on Education for All* and *Framework for Action to Meet Basic Learning Needs*	The preamble of the *Declaration* emphasises the necessity to give to present and coming generations an expanded vision of, and a renewed commitment to, basic education. One of the six key goals in terms of the *Framework for Action* is the achievement of universal access to, and completion of, primary education by the year 2000. See 7.3. below.
• Education for All Summit of Nine High-Population Developing Countries, • co-sponsored by UNESCO, UNICEF and UNFPA, • held at New Delhi, India from 12 to 16 December 1993, • adopts *Delhi Declaration* and *Framework for Action*	At the Summit, representatives of the nine most populous developing nations (Bangladesh, Brazil, China, Egypt, India, Indonesia, Mexico, Nigeria and Pakistan—also termed the E-9 countries ("E" standing for "education")) pledged to reach the education for all goals in the spirit of the World Conference on Education for All of 1990. The said countries account for half of the world's population.
• World Conference on Special Needs Education: Access and Quality, • convened by UNESCO, • held at Salamanca, Spain from 7 to 10 June 1994, • adopts *Salamanca Statement on Principles, Policy and Practice in Special Needs Education* and *Framework for Action*	In para. 1 *Salamanca Statement*, the participants recognise "the necessity and urgency of providing education for children, youth and adults with special educational needs within the regular education system . . .".
• *Declaration*[6] and *Integrated Framework of Action*[7] *on Education for Peace, Human Rights and Democracy*	The preamble of the *Declaration* states that "education should promote knowledge, values, attitudes and skills conducive to respect for human rights and to an active commitment to the defence of such rights and to the building of a culture of peace and democracy".

[5] Most of the texts of the documents adopted at the Intergovernmental Conferences are available on the website of UNESCO at www.unesco.org. For a brief discussion of some of the documents, see Singh, 2001, pp. 60–67.

[6] The Declaration was adopted at the forty-fourth session of the International Conference on Education, held at Geneva, Switzerland in 1994. It has been endorsed by the twenty-eighth session of the General Conference of UNESCO in 1995.

[7] The Integrated Framework of Action on Education for Peace, Human Rights and Democracy was prepared by the Director-General of UNESCO and has been approved by the twenty-eighth session of the General Conference of UNESCO in 1995.

• Mid-Decade Meeting of the International Consultative Forum on Education for All, • held at Amman, Jordan from 16 to 19 June 1996, • adopts *Education for All: Achieving the Goal: The Amman Affirmation*	The Meeting assessed the progress towards the year 2000 goals set at the World Conference on Education for All in 1990. See 7.3. below.
• Fifth International Conference on Adult Education, • convened by UNESCO, • held at Hamburg, Germany from 14 to 18 July 1997, • adopts *Hamburg Declaration on Adult Learning* and *Agenda for the Future*	The *Declaration* calls for a new commitment to the development of adult learning. Para. 8 Declaration refers to the knowledge-based societies that are emerging around the world and states that new demands from society and working life raise expectations requiring individuals to continue renewing knowledge and skills throughout the whole of their lives.
• World Conference on Higher Education: Higher Education in the Twenty-First Century: Vision and Action, • convened by UNESCO, • held at Paris, France from 5 to 9 October 1998, • adopts *World Declaration on Higher Education for the Twenty-First Century: Vision and Action* and *Framework for Priority Action for Change and Development in Higher Education*	In the preamble of the *Declaration* it is stated that society "has become increasingly knowledge-based so that higher learning and research now act as essential components of cultural, socio-economic and environmentally sustainable development", and that "[h]igher education . . . therefore . . . must proceed to the most radical change and renewal it has ever been required to undertake . . .".
• Second International Congress on Technical and Vocational Education, • convened by UNESCO, • held at Seoul, Republic of Korea from 26 to 30 April 1999, • adopts *Technical and Vocational Education and Training: A Vision for the Twenty-First Century: Recommendations to the Director-General of UNESCO*	The preamble of the *Recommendations* stresses that globalisation and the revolution in information and communication technology signal the need for a new human-centred development paradigm. Recognising this need, the Recommendations formulate guidelines for TVE policy to address the employment and other socio-economic challenges of the early twenty-first century.
• World Education Forum, • co-sponsored by UNDP, UNESCO, UNFPA, UNICEF and the World Bank, • held at Dakar, Senegal from 26 to 28 April 2000, • adopts *Education for All: Meeting our Collective Commitments: The Dakar Framework for Action*	The Forum assessed whether the year 2000 goals set at the World Conference on Education for All in 1990 had been reached. Despite progress, these had not been achieved. The *Framework for Action* now provides for the achievement of universal access to, and completion of, primary education by the year 2015. See 7.3. below.

2.3. *Other Activities Relevant to the Right to Education*

- In the 1960s, the UN General Assembly and ECOSOC in partnership with UNESCO developed a *World Campaign for Universal Literacy*. In Resolutions 1937 (XVIII) of 11 December 1963 and 2043 (XX) of 8 December 1965, the General Assembly addressed recommendations on the eradication of illiteracy to member states and to UNESCO.[8]
- UN General Assembly Resolution 2412 (XXIII) of 17 December 1968 designated 1970 as "International Education Year". The year was intended as an opportunity for reflection and action by member states in order to improve and expand their education systems.[9]
- In 1972, the International Commission on the Development of Education, convened by UNESCO and chaired by Edgar Faure, published its Report *Learning to Be: The World of Education Today and Tomorrow*. The report firmly established the concept of lifelong learning.
- In an effort to spread literacy and education, the UN General Assembly, in Resolution 42/104 of 7 December 1987, designated 1990 as "International Literacy Year". In 1989, UNESCO adopted a *Plan of Action for the Eradication of Illiteracy by the Year 2000*.[10]
- With a view to strengthening human rights education, the UN General Assembly, in Resolution 49/184 of 23 December 1994, proclaimed the ten-year period beginning on 1 January 1995 the United Nations Decade for Human Rights Education. A *Plan of Action of the United Nations Decade for Human Rights Education (1995–2004)* was adopted.[11] The Office of the UNHCHR co-ordinated its implementation.
- In 1996, the International Commission on Education for the Twenty-First Century, convened by UNESCO and chaired by Jacques Delors, published its Report *Learning: The Treasure Within*.[12] In terms of the report, if education is to succeed in its tasks, it must be organised around four fundamental types of learning which, throughout a person's life, will be the pillars of knowledge: *learning to know*, that is, acquiring the instruments of understanding; *learning to do*, so as to be able to act creatively on one's environment; *learning to live together*, so as to participate and co-operate with other people in all human activities; and *learning to be*, an essential progression which proceeds from the previous three.

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[8] See Hodgson, 1998, p. 32.
[9] See *ibidem* at p. 33.
[10] See *ibidem* at pp. 33–34.
[11] The Plan of Action is contained in the "Note by the Secretary-General", UN Doc. A/51/506/Add.1 of 12 December 1996.
[12] See Delors, J. *et al.*, *Learning: The Treasure Within: Report to UNESCO of the International Commission on Education for the Twenty-First Century*, Paris: UNESCO, 1996.

- By virtue of Resolution 1997/7 of 22 August 1997, the Sub-Commission on Prevention of Discrimination and Protection of Minorities encouraged states to make all necessary efforts to ensure the realisation of the right to education and the promotion of human rights education, and decided to place the question of the right to education, especially human rights education, on the agenda of the Sub-Commission for the duration of the United Nations Decade for Human Rights Education.[13]
- An International Conference on Child Labour (co-sponsored by the ILO and UNICEF) was held at Oslo, Norway from 27 to 30 October 1997. The Conference adopted an *Agenda for Action*, which in paragraph 3.18 reaffirms the child's right to education and stresses that all work which interferes with the child's education must be regarded as unacceptable.[14]
- UN General Assembly Resolution 52/84 of 12 December 1997 on Education for All appeals to states to redouble their efforts to achieve their goals of *education for all*. See 7.3. below.
- Resolution 1998/33 of 17 April 1998 of the Commission on Human Rights appointed a Special Rapporteur of the Commission on Human Rights for a period of three years, whose mandate focused on the right to education. Resolutions 2001/29 of 20 April 2001 and 2004/25 of 16 April 2004 each renewed the mandate for a period of three years. See 7.4. below.
- On 15 March 2001, the Right to Education Project was founded by Katarina Tomaševski, former Special Rapporteur of the Commission on Human Rights on the Right to Education. Located at www.right-to-education.org, it is a public access human rights resource, devoted to defending and promoting the right to education, human rights in education and human rights through education.
- An International Consultative Conference on School Education in Relation with Freedom of Religion and Belief, Tolerance and Non-Discrimination (organised by the Special Rapporteur of the Commission on Human Rights on Freedom of Religion or Belief) was held at Madrid, Spain

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[13] Resolution 1997/7 of 22 August 1997 further requested Mr. Mustapha Mehedi to prepare a working paper on the right to education. The working paper is entitled *The Realisation of Economic, Social and Cultural Rights: The Realisation of the Right to Education, including Education in Human Rights* and is contained in UN Doc. E/CN.4/Sub.2/1998/10. Resolution 1998/11 of 20 August 1998 requested Mr. Mehedi to prepare a more detailed working paper on the right to education. The working paper is entitled *The Realisation of Economic, Social and Cultural Rights: The Realisation of the Right to Education, including Education in Human Rights: The Content of the Right to Education* and is contained in UN Doc. E/CN.4/Sub.2/1999/10.

[14] The text of the Agenda for Action has been reproduced in Bjerkan, L. and C. Gironde, *Achievements and Setbacks in the Fight against Child Labour: Assessment of the Oslo Conference on Child Labour, October 27–30, 1997*, Norway: Fafo Institute for Applied Social Sciences, 2004 (Fafo Research Programme on Trafficking and Child Labour) (Fafo Report No. 439).

from 23 to 25 November 2001. The Conference adopted a *Final Document*, which defines a set of recommendations to guide the establishment of curricula and textbooks at the primary and secondary educational levels to ensure that education serves to prevent intolerance and discrimination based on religion or belief.

- As part of the global effort towards *education for all* and with a view to eradicating illiteracy, the UN General Assembly, in Resolution 56/116 of 19 December 2001, proclaimed the ten-year period beginning on 1 January 2003 the United Nations Literacy Decade.[15] See 7.3. below.
- Emphasising that education is indispensable for achieving sustainable development, the UN General Assembly, in Resolution 57/254 of 21 February 2003, proclaimed the ten-year period beginning on 1 January 2005 the United Nations Decade of Education for Sustainable Development.

3. *The Education for All (EFA) Process*[16]

The Education for All (EFA) process will briefly be described and then evaluated.

3.1. *A Description of the Education for All (EFA) Process*

Whereas the mobilising slogan in the 1960s was Universal Primary Education (UPE), it has been Education for All (EFA) since 1990. Universal Primary Education was to be achieved by the year 1980. This goal was not reached, however. In fact, at the start of the 1990s, it had to be conceded that more than 100 million children, including at least 60 million girls, had no access to primary schooling. Likewise, it had to be admitted that 960 million adults, two-thirds of whom were women, were illiterate, and further that functional illiteracy was a significant problem in all countries, industrialised and developing.[17] It was against this background that UNDP, UNESCO, UNICEF, the World Bank and, later, also UNFPA co-sponsored the World Conference on Education for All, held at Jomtien, Thailand from 5 to 9 March 1990.[18] The Conference adopted the *World*

[15] The Plan of Action of the United Nations Literacy Decade is contained in the "Report of the Secretary-General", UN Doc. A/57/218 of 16 July 2002.

[16] The texts of all documents produced within the framework of the Education for All (EFA) process are available on UNESCO's Education for All website at www.unesco.org/education/efa/index.shtml.

[17] See the preamble of the World Declaration on Education for All.

[18] Delegates from 155 states and representatives from some 20 intergovernmental organisations and 150 NGOs participated in the Jomtien Conference.

Declaration on Education for All and the *Framework for Action to Meet Basic Learning Needs*.[19] This was the beginning of the so-called *Education for All (EFA) process*.

The *Declaration*, in its preamble, acknowledges that "the current provision of education is seriously deficient" and, therefore, recognises "the necessity to give to present and coming generations an expanded vision of, and a renewed commitment to, basic education". Article 1(1) sheds light on the meaning of the term "basic education":

> Every person—child, youth and adult—shall be able to benefit from educational opportunities designed to meet their basic learning needs. These needs comprise both essential learning tools (such as literacy, oral expression, numeracy, and problem solving) and the basic learning content (such as knowledge, skills, values, and attitudes) required by human beings to be able to survive, to develop their full capacities, to live and work in dignity, to participate fully in development, to improve the quality of their lives, to make informed decisions, and to continue learning. The scope of basic learning needs and how they should be met varies with individual countries and cultures, and inevitably, changes with the passage of time.[20]

Article 3 states that basic education must be provided to all and emphasises that it must be equitable, *i.e.* equally accessible to girls and women, vulnerable groups in society and the disabled. Article 4 points out that the focus of basic education must be on actual learning acquisition rather than on mere enrolment and completion of education. Under article 5, basic education includes early childhood care and initial education, universal primary education, a variety of delivery systems for youth and adults, for example, literacy programmes, and all available instruments and channels of information, such as the media, to convey essential knowledge. The *Framework of Action* called upon countries to set their own targets for the 1990s in terms of the following dimensions:

- expansion of early childhood care and development, especially for the poor;
- universal access to and completion of primary education by the year 2000;
- improvement in learning achievement based on an agreed-upon percentage of an age group (*e.g.* 80 per cent of 14-year olds) attaining a defined level;

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[19] The texts of these documents are available at www.unesco.org/education/efa/index.shtml.

[20] UNICEF has affirmed that primary education constitutes the core of "basic education" but that "basic education" is a wider concept than primary education. Whereas the latter term refers to formal schooling for children of primary school age, the former term also includes non-formal approaches to primary education, "second chance" "primary" education for youth and adults, adult education and literacy, early childhood programmes and parents' education. See "Unicef Strategies in Basic Education", UNICEF Doc. E/ICEF/1995/16 (7 April 1995), para. 8 and fig. 1.

- reduction of the adult illiteracy rate to half its 1990 level by the year 2000, with special emphasis on female literacy;
- expansion of basic education and training for youth and adults; and
- improved dissemination of the knowledge, skills and values required for better living and sustainable development.[21]

The Framework of Action envisaged action at the national and the international level. Countries were expected to assess basic learning needs and plan action accordingly, and to mobilise resources. International bodies, notably those sponsoring the Conference, were accorded the role of providing sustained long-term support for national action.

The Jomtien Conference created a Consultative Forum on Education for All with a mandate to periodically review progress towards these goals, including a major review after ten years. At the Mid-Decade Meeting of the International Consultative Forum on Education for All, held at Amman, Jordan from 16 to 19 June 1996,[22] participants adopted a final communiqué, entitled *Education for All: Achieving the Goal: The Amman Affirmation*,[23] which recognised that access to primary education had improved, but also expressed concern that the drive to get children into primary school by the year 2000 had overshadowed other priorities of the Jomtien Conference, notably, the education of girls and the Conference's integrated vision of basic education.

As a prelude to the ten-year review at the World Education Forum, the participating countries took part in the EFA 2000 Assessment. The Assessment was a massive and detailed analysis of the state of basic education in the world. In the end, this yielded 167 state reports, 11 regional reports and 14 thematic studies.[24] The results of the assessment were presented at the World Education Forum, co-sponsored by UNDP, UNESCO, UNFPA, UNICEF and the World Bank and held at Dakar, Senegal from 26 to 28

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[21] Framework for Action to Meet Basic Learning Needs, point 8.

[22] Delegates from 73 states and representatives from intergovernmental and non-governmental organisations participated in the Meeting. For detailed information on the Meeting, see "Education for All: Achieving the Goal: Final Report of the Mid-Decade Meeting of the International Consultative Forum on Education for All, Amman, Jordan, 16–19 June 1996", available at www.unesco.org/education/efa/index.shtml.

[23] The text of this document is available at www.unesco.org/education/efa/index.shtml.

[24] For detailed information on the EFA 2000 Assessment, see the following three publications: Mellor, W. (ed.), *Education for All 2000 Assessment: Global Synthesis*, France: UNESCO, 2000, Sauvageot, C. (ed.), *Education for All 2000 Assessment: Statistical Document*, France: UNESCO, 2000, and Peppler Barry, U. (ed.), *Education for All: Status and Trends 2000: Assessing Learning Achievement*, France: UNESCO, 2000. These publications, the state reports, the regional reports and the thematic studies are available at www.unesco.org/education/efa/index.shtml.

April 2000.[25] The optimism of Jomtien was tempered by the recognition that, despite progress, the overall goal of universal basic education had not, in fact, been met. In the year 2000, more than 113 million children had no access to primary education and 880 million adults were illiterate.[26] The failure was ascribed to a number of factors. It was, for example, said that the world had changed in ways that could not have been anticipated at Jomtien. Communism in Europe had collapsed and the resultant end of the Cold War had led to a redrawing of the global map and shifts in national alliances. There had also been a proliferation of ethnic conflicts and a growing number of refugees and displaced persons. It was further stated that the HIV/AIDS pandemic had had a devastating impact on the teaching force in many countries and, in addition, that the rift between rich and poor had increased even further.[27] The Forum thus adopted a revised plan of action, entitled *Education for All: Meeting our Collective Commitments: The Dakar Framework for Action*.[28] The Framework for Action lays down six key goals:

- expanding early childhood care and education, especially for vulnerable children;
- universal access to and completion of free and compulsory primary education of good quality by 2015;
- ensuring that the learning needs of young people and adults are met through access to learning and life skills programmes;
- achieving a 50 per cent improvement in levels of adult literacy by 2015, especially for women;
- eliminating gender disparities in primary and secondary education by 2005 and achieving gender equality in education by 2015; and
- improving all aspects of the quality of education.[29]

All states were obliged to develop or strengthen existing national plans of action by 2002, setting out concrete strategies for achieving the Dakar

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[25] Delegates from 164 states and representatives from intergovernmental and non-governmental organisations participated in the Forum. For detailed information on the Forum, see "Final Report of the World Education Forum, Dakar, Senegal, 26–28 April 2000", available at www.unesco.org/education/efa/index.shtml.

[26] See point 5 of the Dakar Framework for Action.

[27] "Final Report of the World Education Forum, Dakar, Senegal, 26–28 April 2000", "Introduction", p. 9.

[28] The text of this document is available at www.unesco.org/education/efa/index.shtml. There further exists an *Expanded Commentary on the Dakar Framework for Action*, prepared by the World Education Forum Drafting Committee, also available at the stated website.

[29] Dakar Framework for Action, point 7.

goals.[30] UNESCO has been mandated by the World Education Forum to co-ordinate the global efforts to achieve Education for All by 2015.[31] As far as monitoring progress towards Education for All is concerned, UNESCO annually issues the EFA Global Monitoring Report, which is largely based on data collected by the EFA Observatory in the UNESCO Institute for Statistics.

Importance has been added to two of the Dakar goals by virtue of their inclusion in the *UN Millennium Declaration*, adopted by the UN Millennium Summit, held at New York, USA from 6 to 8 September 2000,[32] the Declaration's aim being to promote a comprehensive approach and a co-ordinated strategy directed at advancing development and progress and eradicating poverty. Paragraph 19 of the Declaration states, amongst others, that by 2015 "children everywhere, boys and girls alike, [must] be able to complete a full course of primary schooling" and that "girls and boys [must] have equal access to all levels of education".[33] The UN Secretary-General prepares an annual report on progress achieved towards implementing the Declaration, based on data collected by the UN Statistics Division. States are further obliged to prepare national monitoring reports, UNDP supporting the preparation of the reports.

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[30] *Ibidem* at points 9 and 16.

[31] UNESCO's Director-General annually convenes a small and flexible *High-Level Group on Education for All* to sustain political momentum and mobilise resources for basic education. UNESCO additionally brings together a *Working Group on Education for All* to provide technical guidance and information exchange between all partners in the EFA process. The EFA High-Level Group held its First Meeting at UNESCO from 29–30 October 2001, its Second Meeting at Abuja, Nigeria from 19–20 November 2002, its Third Meeting at New Delhi, India from 10–12 November 2003 and its Fourth Meeting at Brasilia, Brazil from 8–10 November 2004, each of these meetings having concluded with the adoption of a Communiqué of the EFA High-Level Group.

[32] The UN Millennium Declaration was adopted by UNGA Resolution 55/2 of 8 September 2000. For more information on the Millennium Development Goals of the UN Millennium Declaration, see the website of the UN at www.un.org/millenniumgoals.

[33] This has been translated by the UN into the following goals and targets, measured by the following indicators: *Goal 2*: Achieve universal primary education; Target 3: Ensure that, by 2015, children everywhere, boys and girls alike, will be able to complete a full course of primary schooling; Indicators: net enrolment ratio in primary education, proportion of pupils starting grade 1 who reach grade 5, and literacy rate of 15–24 year-olds; and *Goal 3*: Promote gender equality and empower women; Target 4: Eliminate gender disparity in primary and secondary education, preferably by 2005, and in all levels of education no later than 2015; Indicators: ratio of girls to boys in primary, secondary and tertiary education, ratio of literate women to men (15–24 years old), share of women in wage employment in the non-agricultural sector, and proportion of seats held by women in national parliament.

3.2. *An Evaluation of the Education for All (EFA) Process*

It has been stated:

> The language of the final document adopted by the Jomtien Conference merged human needs and market forces, moved education from governmental to social responsibility, made no reference to the international legal requirement that primary education be free-of-charge, introduced the term "basic education" which confused conceptual and statistical categories. The language elaborated at Jomtien was different from the language of international human rights law.[34]

Unfortunately, this is an accurate description of the Jomtien final document and, in fact, of EFA documents in general. As part of the EFA process and prior efforts directed at universal primary education, an international commitment to primary education for all has repeatedly, once per decade, been made. Each pledge was betrayed, however, to be followed by yet another betrayed pledge.[35] The reason for this lies in the avoidance by the various documents of human rights language.

> The difference which human rights bring can be expressed in one single word—violation. The mobilising power of calling a betrayed pledge a human rights violation is immense.[36]

EFA documents formulate noble ends. But, they do not state who is obliged to fulfil these ends. Human rights language would have introduced the missing element of "obligations". It would have stated who is responsible for using which means to achieve education for all and further who is liable for any failure to attain this goal. If a pledge becomes a human rights obligation, a failure to realise it constitutes a human rights violation, entailing a corollary duty to compensate victims and to ensure that a failure does not happen again. These features are absent from EFA documents. EFA documents fail to say that it is states, acting individually and through intergovernmental organisations, who bear the obligation to implement education for all.[37]

Less than one year before the final document of Jomtien was adopted in 1990, the international community had adopted the Convention on the

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[34] Tomaševski, 2001f, p. 10. Also Philip Alston, as former Chairperson of the Committee on Economic, Social and Cultural Rights, has held that the Jomtien approach cannot be qualified as a human rights approach. See UN Doc. E/C.12/1998/SR.50, para. 23.

[35] Most recently, it had to be conceded that "we have not met our goal of ensuring that there is an equal number of girls to boys in primary and secondary education by 2005". See Communiqué of EFA High-Level Group, Fourth Meeting, held at Brasilia, Brazil from 8–10 November 2004, para. 2.

[36] Tomaševski, 2001f, p. 10.

[37] See Tomaševski, 2001b, pp. 14–17 and Tomaševski, 2001g, pp. 4–5.

Rights of the Child (CRC) in 1989. Although both EFA documents as well as the CRC deal with education, the different instruments do so in radically different ways. Whereas the CRC espouses a human rights approach to education, EFA documents do not. The existence of two essentially different approaches in basic instruments addressing education has been stated to have impeded a uniform UN policy on education.[38] It is worthwhile commenting on the two approaches, highlighting the importance of adopting a human rights approach to education.

Article 28(1) CRC lays down "the right of the child to education" and expects states parties to achieve this right progressively. This contrasts with the key formulation agreed at Jomtien that "[e]very person—child, youth and adult—shall be able to benefit from educational opportunities designed to meet their basic learning needs"[39] and repeated almost verbatim at Dakar that ". . . all children, young people and adults have the human right to benefit from an education that will meet their basic learning needs . . .".[40] The Jomtien formulation does not refer to education as a human right. The subsequent Dakar formulation does speak of a human right to education, but fails to mention the corresponding state obligations.[41] Neither the Jomtien nor the Dakar document thus answers the question as to who should realise education for all.

Article 7 World Declaration on Education for All provides that national, regional and local educational authorities have "a unique obligation" to provide basic education for all, but then adds that they cannot be expected to carry out that obligation alone. Article 7 hence goes on to state that partnerships are necessary between government and NGOs, the private sector, local communities, religious groups and families. It is correct, of course, that also the latter hold duties with regard to the right to education. In a sense, however, article 7 appears to countenance a large-scale withdrawal of the state from education. The suggestion seems to be that families should share in the costs of their children's education, that private enterprises should be encouraged to provide educational services and that the state's role in education should be diminished. This conflicts with

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[38] See Tomaševski, 1999a, para. 33 (UN Doc. E/CN.4/1999/49).

[39] World Declaration on Education for All, art. 1(1).

[40] Dakar Framework for Action, point 3.

[41] It should be pointed out that the preamble of the World Declaration on Education for All recalls that education is a fundamental right. Likewise, point 6 Dakar Framework for Action states that education is a fundamental human right. It remains a fact, however, that, in general, both the Jomtien and Dakar document prefer to use terms such as "access to education" or "meeting basic learning needs" rather than the term "right to education".

the notion inherent in education as a human right, that education is a public good for which the state bears the primary responsibility.[42]

An important new factor in the EFA process has been the leadership of intergovernmental organisations. The customary pattern of states negotiating and acting has largely been replaced by one where global actors, such as UNDP, UNESCO, UNFPA, UNICEF and the World Bank, play key roles. Governmental obligations flowing from human rights exist at two levels. They exist not solely at the level of individual states. They also exist at the level of intergovernmental organisations, *i.e.* where states act through intergovernmental organisations. This is, however, still not fully appreciated, so that, in consequence, the organisations concerned presently remain beyond the reach of international human rights law. EFA documents should thus have contained a clear statement that intergovernmental organisations are committed to the right to education. In view of the absence of such a statement, it is to be feared that policies formulated by these organisations, which impede realisation of the right to education, cannot be subjected to human rights scrutiny.[43]

Article 10(1) World Declaration on Education for All provides in part:

> Meeting basic learning needs constitutes a common and universal human responsibility. It requires international solidarity and equitable and fair economic relations in order to redress existing economic disparities.

Point 21 Dakar Framework for Action provides in part:

> Achieving Education for All will require additional financial support by countries and increased development assistance and debt relief for education by bilateral and multilateral donors, estimated to cost in the order of $8 billion a year.

These provisions are rather vague and fail to place a clear obligation on actors in the EFA process to mobilise resources and make them available for the purpose of achieving education for all. It has been stated that EFA is affordable and that $8 billion extra spending a year is less than two per cent of the annual estimated military costs world-wide.[44] Nevertheless, in the absence of clear obligations, the resources necessary for achieving education for all may not be forthcoming. UNESCO's EFA Global Monitoring

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[42] Tomaševski, 2001g, pp. 4–5 also criticises the use of the term "partnership" in the EFA process to depict relations between donors and recipients, creditors and debtors, governments and NGOs. She states, "*Partnership* does not reflect the relationship between a creditor (or donor) holding a chequebook and a government which desperately needs that cheque, nor does it fit a truism shared amongst human rights NGOs whereby one cannot do human rights work and be popular with governments".

[43] See Tomaševski, 2001f, p. 9 and pp. 11–13.

[44] UNESCO, *Education for All: An Achievable Vision*, Paris: UNESCO, 2000, p. 6.

Report 2003/4 introduced an Education for All Development Index (EDI) to measure overall progress towards education for all.[45] The EDI has been calculated for 127 countries for the year 2001. The results are disquieting, as they reveal that only forty-one countries have either achieved the more easily quantifiable EFA goals or are close to doing so, whereas thirty-five countries are very far from achieving the goals.[46] The principal reason why many countries do not make more significant progress in achieving education for all is their lack of sufficient resources. Point 10 Dakar Framework for Action states that "many countries currently lack the resources to achieve education for all", adding though that "no countries seriously committed to education for all will be thwarted in their achievement of this goal by a lack of resources". There is, however, a huge gap between rhetoric and reality in support for education for all. Although aid for basic education from bilateral and multilateral donors taken together modestly increased in recent years, support for basic education remains small in comparison with the projected needs for education for all.[47] In November 2003, it has been observed that there is a "financing gap between the current level of support for basic education, amounting to US$1,5 billion per year, and the amount needed in external support to reach the gender goals and universal primary education by 2015, estimated at an additional US$5,6 billion per year".[48] Nevertheless, in the absence of clear obligations on bilateral and multilateral donors to provide the resources necessary for achieving education for all, it remains for international documents to kindly remind the actors concerned that they "should fulfil their commitments made at Dakar" and subsequently.[49]

Article 28(1) CRC lays down the obligation of states parties to make available primary, secondary and higher education. Primary education must be made compulsory and free. The introduction of free education is also

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[45] The following are the EDI constituents and their related indicators: 1. universal primary education: net enrolment ratio, 2. adult literacy: literacy rate of the age group 15 years and over, 3. gender parity: gender-specific education for all index; this is the simple average value of the gender parity indices in primary education, secondary education and adult literacy and 4. the quality of education: survival rate to grade 5 in primary education. The same weight is given to each of the index constituents. See UNESCO, 2003, pp. 111–113.

[46] Sixteen countries have achieved education for all (EDI: 0.98–1.00), 25 countries are close to the goal (EDI: 0.95–0.97), 51 countries hold an intermediate position (EDI: 0.80–0.94) and 35 countries are far from the goal (EDI: less than 0.80). On the whole, there appears to be movement, though very slow, towards the achievement of education for all. See UNESCO, 2004, pp. 136–139.

[47] See UNESCO, 2003, pp. 244–245 and UNESCO, 2004, pp. 195–196.

[48] Communiqué of EFA High-Level Group, Third Meeting, held at New Delhi, India from 10–12 November 2003, para. 7.

[49] *Idem.*

referred to in the context of secondary education. If it is considered that the ILO's Minimum Age Convention, 1973 provides for a minimum age for admission to employment of, at any rate, not less than 15 years, this means that "lower secondary education" under the CRC must also be read to be compulsory.[50] In contrast, basic education in EFA documents entails no more than primary education of about five years.[51] The Jomtien Declaration did not include the requirement of free primary education. Point 7 Dakar Framework for Action now, however, mentions free primary education. EFA documents are deficient in that they fail to provide for compulsory and free education up to the age of 15. Primary schooling of five years translates into children being at school from six to eleven years only. It is not stated what they should do from the age of eleven. In the context of the current trend of commercialising post-primary education,[52] secondary and further education is increasingly out of reach of many children whose parents are not wealthy enough to pay school fees. The only option for these children will be child labour![53] A further problem is that EFA documents do not address secondary education at all. The EFA process is premised on the assumption that primary education is the key to eradicating poverty. This is a fallacy. The available evidence indicates that secondary education is the key to reducing poverty.[54] The UN Economic Commission for Latin America and the Caribbean (ECLAC) has found that young people have to complete secondary education to have an 80 per cent probability of avoiding poverty.[55]

In the light of the avoidance by EFA documents of human rights language, it has been asked whether a post-human rights era is dawning.[56] The approach first taken at Jomtien has also been adopted in more recent

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[50] See 6.3.2.2. *supra* and 10.4.3.2. *infra.*

[51] Para. 38 of the Plan of Action (see UNGA Resolution S-27/2 of 10 May 2002) adopted by the Special Session of the General Assembly on Children, held at New York, USA from 8–10 May 2002 refers to five years of schooling. In fact, the meaning of the term "basic education" is all but clear. Tomaševski states, "On the global level we have a complete muddle. With global education strategists in the 1990s having introduced the concept of 'basic' education, instead of primary or elementary education, this has created a problem because there is no common definition of what is 'basic'. Is it longer than primary education or shorter?". See Human Rights Features, 2004, p. 7. Elsewhere, it is stated that "secondary education . . . includes completion of basic education". See CESCR, General Comment No. 13 (Twenty-First Session, 1999) [UN Doc. E/2000/22] The right to education (art. 13 ICESCR) [*Compilation*, 2004, pp. 71–86], para. 12.

[52] On the commercialisation of education, see 12.2.2. *infra.*

[53] See Tomaševski, 2001b, p. 16.

[54] See *idem.*

[55] See Economic Commission for Latin America and the Caribbean, *The Equity Gap: Latin America, the Caribbean and the Social Summit*, Santiago de Chile, 1997, p. 116.

[56] See Tomaševski, 2001b, pp. 15–16.

documents. To mention two examples: The *UN Millennium Declaration*[57] states, in paragraph 19, that by 2015 all children should "be able to complete a full course of primary schooling". Similarly, the *Declaration* of the Special Session of the General Assembly on Children[58] refers, in paragraph 7, to "our commitment" to ensure that children "must have access to and complete primary education that is free, compulsory and of good quality". In both cases, there is neither a reference to education as a human right nor to obligations of the state in this regard.[59] Against this background, "the need to forge a global alliance to rescue the right to education from disappearance" has been emphasised.[60] On a positive note, UNESCO's EFA Global Monitoring Reports evidence an increasing openness towards human rights. It has been stated in this context that "[t]he integration of human rights in the analytical framework for the global monitoring of policies and actions for achieving education for all represents a welcome change".[61]

4. *The Special Rapporteur of the UN Commission on Human Rights on the Right to Education*[62]

The position of the Special Rapporteur on the Right to Education[63] was established by the UN Commission on Human Rights as part of its efforts to impart a higher visibility to ESCR. It is the first thematic mandate on a core ESCR. The position was created by Commission on Human Rights Resolution 1998/33 of 17 April 1998 for a period of three years. The stated Resolution also defined the Special Rapporteur's mandate, which, in terms of paragraph 6, was to focus on the right to education, as laid down in the UDHR and the ICESCR. It was decided that the mandate should, amongst others, comprise the following:[64]

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[57] The UN Millennium Declaration was adopted by UNGA Resolution 55/2 of 8 September 2000.

[58] The Special Session of the General Assembly on Children was held at New York, USA from 8–10 May 2002. Its final document, "A world fit for children", was adopted by UNGA Resolution S-27/2 of 10 May 2002.

[59] Para. 38 of the Plan of Action of the Special Session of the General Assembly on Children does, however, state that "[e]ducation is a human right".

[60] Tomaševski, 2001b, p. 16.

[61] Tomaševski, 2004a, para. 2 (UN Doc. E/CN.4/2004/45). See also Wilson, 2003, p. 1.

[62] The texts of all documents relevant in the context of the work of the Special Rapporteur of the UN Commission on Human Rights on the Right to Education are available on the website of the Office of the UNHCHR at www.ohchr.org/english/issues/education/rapporteur/index.htm.

[63] For more information on UN Special Rapporteurs, see UNHCHR, *Human Rights Fact Sheet No. 27: Seventeen Frequently Asked Questions about the United Nations Special Rapporteurs*, Geneva: UN, 2001.

[64] Para. 6 Commission on Human Rights Resolution 1998/33 of 17 April 1998.

- to report on the status, throughout the world, of the progressive realisation of the right to education, including access to primary education, and the difficulties encountered in the implementation of this right, taking into account information and comments received from governments, organisations and bodies of the UN system, other relevant international organisations and NGOs;
- to promote assistance to governments in working out and adopting urgent plans of action, wherever they do not exist, to secure the progressive implementation, within a reasonable number of years, of the principle of compulsory primary education free of charge for all, bearing in mind, *inter alia*, levels of development, the magnitude of the challenge and efforts by governments;
- to take into account gender considerations, in particular the situation and needs of the girl child, and to promote the elimination of all forms of discrimination in education;
- to develop a regular dialogue and discuss possible areas of collaboration with relevant UN bodies, Specialised Agencies and international organisations in the field of education, *inter alia*, UNESCO, UNICEF, UNCTAD and UNDP, and with international financial institutions, such as the World Bank; and
- to identify possible types and sources of financing for advisory services and technical co-operation in the field of access to primary education.

Resolutions 2001/29 of 20 April 2001 and 2004/25 of 16 April 2004 of the Commission on Human Rights each renewed the mandate of the Special Rapporteur for a period of three years.[65] From 1998 to 2004, the post was held by Ms. Katarina Tomaševski of Croatia. Presently, it is held by Mr. Vernor Muñoz Villalobos of Costa Rica.

The Special Rapporteur is responsible to the Commission on Human Rights, to which he or she submits an annual report.[66] Amongst the mat-

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[65] Para. 4 Commission on Human Rights Resolution 2001/29 of 20 April 2001 invited the Special Rapporteur to continue to work in accordance with the above mandate. Para. 9 Commission on Human Rights Resolution 2004/25 of 16 April 2004 invites the Special Rapporteur, amongst others, to gather information from all relevant sources on the realisation of the right to education, and to make recommendations on appropriate measures to promote the realisation of this right, to intensify efforts aimed at identifying ways to overcome difficulties in the realisation of the right to education, to review the interdependence of the right to education with other human rights, and to apply a gender perspective in his or her work.

[66] During her term as Special Rapporteur, Ms. Tomaševski submitted the following reports: Preliminary Report of 13 January 1999 (UN Doc. E/CN.4/1999/49), Progress Report of 1 February 2000 (UN Doc. E/CN.4/2000/6), Annual Report of 9 January 2001 (UN Doc. E/CN.4/2001/52), Annual Report of 7 January 2002 (UN Doc. E/CN.4/2002/60), Annual Report of 13 December 2002 (UN Doc. E/CN.4/2003/9) and Annual Report of 26 December 2003 (UN Doc. E/CN.4/2004/45). She also reported on her missions to

ters addressed in the reports submitted by Ms. Tomaševski during her term as Special Rapporteur, the following may be singled out, as they are also dealt with in the present book:

- The Special Rapporteur has developed what she terms a 4-A scheme for studying the obligations arising from the right to education. In terms of this scheme, education, in all its forms and at all levels, must exhibit four essential features: It must be available, accessible, acceptable and adaptable. See 10.4.1. below.
- On the basis of the 4-A scheme, the Special Rapporteur has made suggestions concerning rights-based indicators for monitoring progressive realisation of the right to education. See 12.3.1.2.2. below.
- The Special Rapporteur has also commented on the changing status of education as a human right. In her reports, she discusses the emergence of the human capital approach to education and the increasing international trade in educational services. See 12.2.1. and 12.2.2. below.
- The Special Rapporteur has further analysed international policies relating to financial obstacles impeding access to education. In this context, she studied the World Bank's education policy and critiqued its (previous) advocacy of the charging of user fees in primary school. See 12.2.3. below.[67]

The Commission on Human Rights has, during its past few sessions, adopted resolutions on the right to education, in which it was prepared to call upon states to comply with various duties with regard to the right to education.[68] Even so, Tomaševski has, on completion of her term as

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Uganda (26 June–2 July 1999) (UN Doc. E/CN.4/2000/6/Add.1), the United Kingdom of Great Britain and Northern Ireland (England) (18–22 October 1999) (UN Doc. E/CN.4/2000/6/Add.2), the United States of America (24 September–10 October 2001) (UN Doc. E/CN.4/2002/60/Add.1), Turkey (3–10 February 2002) (UN Doc. E/CN.4/2002/60/Add.2), Indonesia (1–7 July 2002) (UN Doc. E/CN.4/2003/9/Add.1), the United Kingdom (Northern Ireland) (24 November–1 December 2002) (UN Doc. E/CN.4/2003/9/Add.2), the People's Republic of China (10–19 September 2003) (UN Doc. E/CN.4/2004/45/Add.1) and Colombia (1–10 October 2003) (UN Doc. E/CN.4/2004/45/Add.2/Corr.1).

[67] Ms. Tomaševski considers perhaps the greatest successes of her term as Special Rapporteur "... my 4-A scheme which people easily understand and apply and that I made the World Bank to backtrack on the charging of user fees in primary school". E-Mail dated 20 February 2004 on file with this author.

[68] See Commission on Human Rights Resolutions 2001/29 of 20 April 2001, 2002/23 of 22 April 2002, 2003/19 of 22 April 2003 and 2004/25 of 16 April 2004. Para. 7 of the latter Resolution, for example, urges states, "(a) To give full effect to the right to education and to guarantee that this right is recognised and exercised without discrimination of any kind; (b) To take all appropriate measures to eliminate obstacles limiting effective access to education, notably by girls, including pregnant girls, children living in rural areas, children belonging to minority groups, indigenous children, migrant children, refugee children, internally displaced children, children affected by armed conflicts, children with disabilities,

Special Rapporteur, voiced stern but justified criticism concerning the Commission's resolutions. She considers the stated resolutions to be deficient in that they fail to address the problem that "education has become a traded service" and that forty-five countries have opened their entire edu-

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children affected by infectious diseases, including HIV/AIDS, sexually exploited children, children deprived of their liberty, children living in the street, working children and orphaned children: Taking all necessary legislative measures to prohibit explicitly discrimination in education on the basis of race, colour, descent, national, ethnic or social origin, sex, language, religion, political or other opinion, property, disability, birth or other status which has the purpose or effect of nullifying or impairing equality of treatment in education; (c) To improve all aspects of the quality of education aimed at ensuring excellence of all so that recognised and measurable learning outcomes are achieved by all, especially in literacy, numeracy and essential life skills, and, in this regard, to emphasise the development of quality indicators and monitoring instruments, to promote a sound school environment, school health, preventive education against HIV/AIDS and drug abuse, and science and technology education, and to carry out surveys and build up a knowledge base in order to provide advice on the use of information and communication technologies in education; (d) To promote the renewal and expansion of basic formal education of good quality, which includes both early childhood care and education and primary education, using inclusive and innovative approaches to increase access and attendance for all, for example by providing a minimum monthly income to the families of poor children attending school on a regular basis or free meals for children attending school; (e) To mainstream human rights education in educational activities, in order to strengthen respect for human rights and fundamental freedoms; (f) To enhance the status, morale and professionalism of teachers; (g) To recognise and promote lifelong learning for all, both in formal and in informal settings; (h) To ensure progressively and on the basis of equal opportunity that primary education is compulsory, accessible and available free to all; (i) To adopt all necessary measures to close the gap between the school-leaving age and the minimum age for employment, including by raising the minimum age for employment and/or raising the school-leaving age when necessary, and to ensure access to free basic education and, wherever possible and appropriate, vocational training for all children liberated from the worst forms of child labour; (j) To adopt effective measures to encourage regular attendance at school and reduce school drop-out rates; (k) To support domestic literacy programmes, including vocational education components and non-formal education, in order to reach marginalised children, youth and adults, especially girls and women, to ensure that they enjoy the right to education and acquire the life skills necessary to overcome poverty and exclusion; (l) To support the implementation of plans and programmes of action to ensure quality education and improved enrolment and retention rates for boys and girls and the elimination of gender discrimination and gender stereotypes in educational curricula and materials, as well as in the process of education; (m) To take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse in schools, and in this context to take measures to eliminate corporal punishment in schools, and to incorporate in their legislation appropriate sanctions for violations and the provision of redress and rehabilitation for victims; (n) To consider undertaking or supporting studies on best practices for elaborating and implementing strategies for improving the quality of education and meeting the learning needs of all; (o) To give appropriate priority to the collection of quantitative and qualitative data relating to gender disparities in education; (p) To submit information on best practices for the elimination of discrimination in access to education, as well as for the promotion of quality education, to the Special Rapporteur; (q) To ensure that no child is prevented from receiving free primary education on account of his or her disability; (r) To contribute to efforts to mobilise resources by the international community to assist all States to achieve the goal of education for all children by 2015".

cation systems, from pre-primary to university, to complete privatisation. Such privatisation meant that only people with adequate purchasing power could buy education, but that poor people could not get access to education.[69] The resolutions, she holds, are also deficient in that a look into them reveals that "the right to secondary or university education has completely disappeared". This was dangerous in view of the fact that secondary education was the key to eradicating poverty.[70]

In 2004, Tomaševski was the first Special Rapporteur in the history of the UN human rights special mechanisms to request that the mandate of the Special Rapporteur on the Right to Education not be renewed. As reasons behind her decision, she named the inability of the Commission to establish a *human rights* mandate on education and the failure of the Office of the UNHCHR to provide the promised support for the mandate. She states that "[w]hen the mandate on the right to education started, it did not start as a right to education, it started as one component of this very long resolution on economic, social and cultural rights including obstacles and difficulties faced by developing countries *etc*." and that the Commission subsequently did not alter its resolution. Similarly, the Office of the UNHCHR dealt with the mandate as an economic one, bundled under the banner of development.[71] Tomaševski complains that the Office of the UNHCHR failed to render the assistance necessary for the execution of the mandate and that she had to do all the work herself and invest more than US$18 000 of her own funds.[72] This was, however, not surprising, because "[t]he Office does not feel any pressure to do proper human rights work because the Commission itself has not defined this mandate as requiring proper human rights work!".[73] Tomaševski argues that the principal reason for the Commission's lack of a much more assertive profiling of the right to education is the absence of a vocal NGO community on the stated right, preparing good documents, devising sensible strategies, and involved in well-co-ordinated lobbying "to get government delegations to move".[74]

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[69] See Human Rights Features, 2004, p. 7. On the commercialisation of education, see 12.2.2. *infra*.

[70] See Human Rights Features, 2004, p. 7.

[71] See *ibidem* at pp. 7–8.

[72] See Tomaševski, 2003a, para. 1 (UN Doc. E/CN.4/2003/9) and Tomaševski, 2004a, para. 1 (UN Doc. E/CN.4/2004/45).

[73] Human Rights Features, 2004, p. 8.

[74] See *idem*.

PART B

A SYSTEMATIC ANALYSIS OF THE RIGHT TO EDUCATION AS PROTECTED IN ARTICLE 13 OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Part A undertook a general analysis of the protection of the right to education by international law. It dealt with the various international and regional legal instruments and the legal instruments adopted by UNESCO and the ILO as Specialised Agencies of the UN, protecting the right to education. Now that the many legal texts on the right to education have been introduced, a systematic analysis of the right to education will be embarked upon. In section 4.3.2. above, it has been stated that article 13 of the International Covenant on Economic, Social and Cultural Rights may arguably be viewed as the most important formulation of the right to education in an international agreement. Part B will, therefore, present a systematic analysis of article 13 ICESCR. It has already been stated that the ICESCR forms part of the International Bill of Human Rights, which purports to lay down universally accepted human rights standards. The Committee on Economic, Social and Cultural Rights, supervising the ICESCR, has further produced various interpretative materials, such as General Comments, with regard to Covenant rights, including the right to education. These considerations justify an analysis of the right to education in this Part, as protected in article 13 ICESCR.

The discussion will be divided into five parts. Firstly, *Chapter 8* will describe the supervisory system of the ICESCR. This takes the form of a system of state reports, in terms of which states parties must submit reports on the measures adopted to realise the rights of the Covenant in their respective territories, which must then be considered by the Committee on Economic, Social and Cultural Rights. It will be stated what activities the Committee performs, what "jurisprudence" it produces and what the legal nature of that "jurisprudence" is. A knowledge of these aspects is already necessary at the initial stage, as the subsequent chapters will frequently refer to the Committee's activities and "jurisprudence". The next chapter, *Chapter 9*, will address the general provisions of the ICESCR. Articles 2(1), 2(2) and 4 will be examined. Article 2(1) describes the general nature of state obligations under the Covenant, article 2(2) guarantees the enjoyment of the rights of the Covenant without discrimination and article 4 provides for, and at the same time restricts, limitations of Covenant rights. A proper comprehension of these provisions is indispensable for a sound understanding of the nature of the right to education, as laid down in article 13 ICESCR. The discussion in Chapters 8 and 9 will not be conducted *in abstracto*. Throughout it will be strived to relate the treatment of general matters in these two chapters to the right to education in article 13. *Chapter 10* will then analyse article 13 ICESCR itself. This chapter will carefully scrutinise the different aspects of article 13. There will be a discussion of

the right to education, which article 13(1) first sentence recognises in general terms, of the aims of education as laid down in article 13(1) second and third sentence, of the social aspect of the right to education protected in article 13(2) (*i.e.* the obligation of states parties to realise an education system at the primary, secondary, higher and fundamental levels), and of the freedom aspect of the right to education protected in article 13(3) and (4) (*i.e.* the obligation of states parties to respect the right of parents to choose for their children private schools and to ensure the religious and moral education of their children in conformity with their own convictions, and the obligation of states parties to respect the right of persons to establish and direct private schools). The following chapter, *Chapter 11*, will undertake an examination of the Concluding Observations adopted by the Committee on Economic, Social and Cultural Rights, in as far as they address the right to education in article 13 ICESCR. Concluding Observations are adopted after the consideration of state reports by the Committee and they comment on the extent to which the situation in a particular state party was satisfactory in terms of the realisation of the rights of the Covenant. Concluding Observations constitute an important method of clarifying the normative content of Covenant rights. Finally, *Chapter 12* will demonstrate that education needs to be strengthened as a human right by renouncing the human capital approach to education, by restricting free trade in education services and by respecting the right to education in bilateral and multilateral development co-operation activities focusing on education. The chapter will also make suggestions on how to improve the supervision of article 13 ICESCR under the Covenant. It will be argued that the effectiveness of the system of state reports should be enhanced, but that, at the same time, an Optional Protocol to the ICESCR should be adopted, providing for individual and group complaints in relation to Covenant rights, to be considered by the Committee on Economic, Social and Cultural Rights. The Committee would be assigned the task of identifying "violations" of Covenant rights, including "violations" of article 13 ICESCR.

The analysis of article 13 ICESCR will refer to the "jurisprudence" of the Committee on Economic, Social and Cultural Rights (*i.e.* the Committee's Concluding Observations, materials related to its Day of General Discussion on the right to education and its General Comments Nos. 11 and 13 on the right to education). Many other materials produced by various bodies dealing with human rights will also be referred to. This includes a number of decisions of the Human Rights Committee, supervising the ICCPR, made after having heard petitions brought by individuals, and a General Comment of that Committee on the right to freedom of religion. It includes Concluding Observations and General Comment No. 1 on the aims of education of the Committee on the Rights of the Child, supervising the

CRC. Case law of the former European Commission of Human Rights and the European Court of Human Rights on the right to education will briefly be examined. Additionally, a few notable judgements of national courts on various aspects of the right to education will be mentioned. Yet another useful source available when interpreting the right to education are principles or recommendations which have been formulated by groups of experts. Important in this context are the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, and the OSCE Hague Recommendations Regarding the Education Rights of National Minorities. Finally, the different reports prepared by the Special Rapporteur of the Commission on Human Rights on the Right to Education—the position having been created in 1998—will be frequently referred to.

CHAPTER EIGHT

THE SUPERVISORY SYSTEM OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

1. *Introduction*

Unlike the ICCPR, the ICESCR knows no interstate and individual petition procedures. It only provides for a system of state reports, which is the weakest form of supervision available in international human rights law, to ensure that human rights are properly implemented. The discussion which follows will first of all introduce the relevant provisions of Part IV ICESCR, which provides for the system of state report. This is followed by some remarks on the Committee on Economic, Social and Cultural Rights, the body to which supervision of the Covenant has been entrusted. Regarding the various activities performed by the Committee, it is useful to distinguish between what may be termed the Committee's review and its normative function.[1] The *review function* refers to the Committee's task of considering reports which states parties are required to submit on the implementation of the rights of the Covenant in their respective territories. The *normative function* refers to the Committee's practice of holding Days of General Discussion and of issuing General Comments, both of these activities being aimed at clarifying the normative content of provisions of the ICESCR. The discussion will separately address the Committee's review and its normative function. With regard to the review function, attention will be given to the objectives of the reporting procedure, the issue of what state reports must contain, the Committee guidelines regarding the form and content of state reports, in particular in as far as they pertain to articles 13 and 14 ICESCR, and the Committee's *modus operandi*, notably its habit of adopting Concluding Observations on state reports. With regard to the normative function, special reference will be made to the Committee's Day of General Discussion on the right to education in 1998 and its two General Comments Nos. 11 and 13 on the right to education. Finally, and by way of comparison, supervision under the Convention on the Rights of the Child will briefly be discussed.

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[1] See Coomans, 1992, pp. 294–295. He uses the terms "review function" and "creative function".

The present Chapter will not evaluate the effectiveness of the ICESCR's supervisory system, as it stands at present. An attempt to do that will be undertaken in Chapter 12 below. The intention at this stage is rather to introduce the Covenant's system of supervision.

2. *The Implementation of the International Covenant on Economic, Social and Cultural Rights: Part IV ICESCR*

In terms of article 16(1) ICESCR, states parties accept the obligation to submit reports "on the measures which they have adopted and the progress made in achieving the observance of the rights recognised [in the Covenant]".[2] The reports must be submitted to the UN Secretary-General, who must transmit copies to the Economic and Social Council for consideration.[3] Article 17(2) states that reports "may indicate factors and difficulties affecting the degree of fulfilment of obligations under the . . . Covenant". Article 17(3) provides that relevant information, which has previously been furnished to the UN or to any Specialised Agency, need not be reproduced in the report, but that a precise reference to such information suffices.

In article 17(1), the ICESCR envisages that reports are to be furnished "in stages, in accordance with a programme to be established by the Economic and Social Council . . .". The initial reporting schedule established by ECOSOC in 1976 provided for a three-stage, biennial reporting process within a six-year cycle.[4] Each stage was to cover a certain group of Covenant rights, the first stage articles 6 to 9, the second stage articles 10 to 12 and the third stage articles 13 to 15. The reporting schedule was, however, excessively burdensome for states parties, as reports had to be submitted every two years.[5] It also reflected a highly compartmentalised view on the rights of the Covenant. The existing reporting schedule was, therefore, replaced in 1988 by a new reporting schedule.[6] The new reporting schedule requires reports to be submitted every five years.[7]

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[2] The supervisory system of the ICESCR is discussed by Alston, 1987, pp. 332–381, Simma, 1989, pp. 191–196, Simma, 1991, pp. 75–94, Simma, 1992, pp. 382–393, Craven, 1994, pp. 91–113, Craven, 1995, pp. 30–105, Coomans, 1997, pp. 553–568 and Arambulo, 1999, pp. 23–49. See also UNHCHR, *Human Rights Fact Sheet No. 16 (Rev. 1): The Committee on Economic, Social and Cultural Rights*, Geneva: UN, 1991.

[3] Art. 16(2)(a) ICESCR.

[4] See ECOSOC Resolution 1988 (LX), 11 May 1976.

[5] In 1985, the duration of the reporting cycle was extended to nine years. See ECOSOC Decision 1985/132.

[6] See ECOSOC Resolution 1988/4, 24 May 1988.

[7] The first report must be submitted two years after the ICESCR has entered into force for a particular state party.

Instead of reporting on clusters of Covenant rights, the reports under the new schedule must cover the entire Covenant in one comprehensive report.

Article 19 ICESCR provides that ECOSOC may transmit the reports submitted by states parties to the Commission on Human Rights for study and general recommendations or for information. The Commission may thus make general recommendations on the reports. States parties, in turn, may, under article 20 ICESCR, make comments to ECOSOC on any general recommendation. Articles 19 and 20, in effect, create a consultation mechanism which is intended to facilitate the further development of economic, social and cultural rights.

The UN Specialised Agencies are accorded a special role in the implementation of the ICESCR.[8] Their role is set out in, particularly, articles 16(2)(b), 18, 19, 20, 22 and 23. The said provisions have been dealt with above in the context of discussing UNESCO's role in the supervision of the ICESCR.[9]

In terms of article 21 ICESCR, ECOSOC may

> submit from time to time to the General Assembly reports with recommendations of a general nature and a summary of the information received from the States Parties to the present Covenant and the specialised agencies on the measures taken and the progress made in achieving general observance of the rights recognised in the . . . Covenant.

This enables the General Assembly to initiate action, if considered necessary, aimed at improving the protection of economic, social and cultural rights. Under article 22, ECOSOC may

> bring to the attention of other organs of the United Nations, their subsidiary organs and specialised agencies concerned with furnishing technical assistance any matters arising out of the reports . . . which may assist such bodies in deciding, each within its field of competence, on the advisability of international measures likely to contribute to the effective progressive implementation of the . . . Covenant.

ECOSOC is thus envisaged to stimulate international assistance and co-operation directed at promoting the cause of economic, social and cultural rights.

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[8] On the role of the UN Specialised Agencies in the implementation of the ICESCR, see Alston, 1979, pp. 79–118.

[9] See 6.2.1.2. *supra.*

3. *The Committee on Economic, Social and Cultural Rights*

The ICESCR entrusts the supervision of the Covenant to ECOSOC. In 1985, ECOSOC created a Committee on Economic, Social and Cultural Rights (CESCR)[10] to assist it in fulfilling its supervisory role under the Covenant.[11] In practice, the CESCR plays a most vital role in supervising the ICESCR.[12]

The CESCR consists of eighteen members who must be experts with recognised competence in the field of human rights, serving in their personal capacity.[13] The intention in providing for an independent expert committee has been to base the functioning of the Committee on that of the Human Rights Committee of the ICCPR.[14] In an important respect, however, the CESCR differs from the Human Rights Committee. Whereas the latter body is created by the ICCPR, the former body is a subsidiary organ of ECOSOC, operating on the basis of an ECOSOC resolution. Theoretically, therefore, ECOSOC may at any time alter the Committee's mandate, composition or working methods. The status and competence of the Committee may thus be said to be of a mere temporary nature. This has, however, the distinct advantage that the scope of its powers may be more easily expanded, if considered desirable,[15] as the cumbersome procedure for amending a treaty need not be followed.[16]

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[10] See ECOSOC Resolution 1985/17. The CESCR has adopted Rules of Procedure at its third session (1989). They are contained in UN Doc. E/C.12/1990/4/Rev.1. Amendments have been adopted at the fourth (1990) and eighth (1993) sessions.

[11] Until 1986, ECOSOC had entrusted the consideration of state reports to a so-called "Sessional Working Group", consisting initially of state representatives and later of government experts. The Working Group was, however, rather ineffective, mainly due to its politicised nature. In fact, dissatisfaction with the Working Group's effectiveness led to the creation of the CESCR. See Craven, 1995, pp. 39–42 and Arambulo, 1999, pp. 28–30.

[12] The CESCR's first session was still characterised by East-West controversy. However, since its second session, the Committee has been able to develop an efficient methodology for considering state reports. See Alston, P. and B. Simma, "First Session of the UN Committee on Economic, Social and Cultural Rights", in: *American Journal of International Law*, Vol. 81, 1987, pp. 747 *et seqq.*, Alston, P. and B. Simma, "Second Session of the UN Committee on Economic, Social and Cultural Rights", in: *American Journal of International Law*, Vol. 82, 1988, pp. 603 *et seqq.* and Leckie, S., "An overview and appraisal of the Fifth Session of the UN Committee on Economic, Social and Cultural Rights", in: *Human Rights Quarterly*, Vol. 13, 1991, pp. 539 *et seqq.*

[13] See ECOSOC Resolution 1985/17, para. (b). In terms of para. (b), due consideration must be given to equitable geographical distribution and to the representation of different forms of social and legal systems. Members of the Committee are elected by ECOSOC by secret ballot from a list of nominees submitted by states parties. Committee members are elected for terms of four years. See ECOSOC Resolution 1985/17, para. (c).

[14] See Alston, P. and B. Simma, "First Session of the UN Committee on Economic, Social and Cultural Rights", in: *American Journal of International Law*, Vol. 81, 1987, pp. 747–756, at p. 748.

[15] See Arambulo, 1999, p. 34.

[16] Another advantage of the CESCR's present status is that it is financed out of the reg-

Originally, the CESCR was to hold one session of up to three weeks per year.[17] It held its first session in 1987. The Committee soon experienced problems to adequately perform its work within the time at its disposal. Consequently, ECOSOC allowed the Committee to hold extraordinary sessions in 1990, 1993 and 1994. In 1995 then, ECOSOC approved a second permanent annual session to enable the Committee to cope with its workload.[18] In 2000 and 2001, extraordinary sessions have been held additionally to the two permanent sessions. As of December 2004, the Committee has held thirty-three sessions.[19]

The role of the CESCR is "to assist" ECOSOC in "the consideration" of reports of states parties.[20] No attempt has been made to define the precise role of the Committee in considering reports, however. It may be argued that ECOSOC's decision to establish a committee composed of independent experts reflects an intention to create a body which should assume a quasi-judicial function in the supervisory process.[21] Even so, the Committee has preferred to emphasise that it does not consider itself as sitting in judgement over states parties.[22] It is rather thought that the Committee should enter into a "constructive dialogue" with states parties in the reporting process, calling upon state representatives to appear before it to undertake a mutually beneficial discussion regarding the degree to which states parties have realised the rights of the Covenant. As will be indicated below, however, the Committee has in practice developed a number of quasi-judicial elements in its working methods.[23]

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ular budget of the UN, which means that it is not affected in the same way by financial crises as treaty bodies, such bodies being (largely) financed by states parties to the relevant treaty themselves. See Simma, 1989, p. 194.

[17] See ECOSOC Resolution 1985/17, para. (d). The CESCR meets at Geneva, Switzerland.

[18] See ECOSOC Resolution 1995/39, 25 July 1995.

[19] The CESCR is serviced by the Office of the UNHCHR.

[20] See ECOSOC Resolution 1985/17, para. (f). Para. (f) states, "The Committee shall submit to the Council a report on its activities, including a summary of its consideration of the reports submitted by States parties to the Covenant, and shall make suggestions and recommendations of a general nature on the basis of its consideration of those reports and of the reports submitted by the specialised agencies, in order to assist the Council to fulfil, in particular, its responsibilities under articles 21 and 22 of the Covenant . . .".

[21] See Craven, 1995, p. 56.

[22] See Alston, UN Doc. E/C.12/1987/SR.4, para. 8.

[23] See 8.4.3. and 8.5.2. *infra.*

4. *The Review Function of the Committee on Economic, Social and Cultural Rights: Considering State Reports*

The review function refers to the CESCR's task of considering state reports. In the performance of this task, the Committee examines whether, and to what extent, states parties comply with their obligations under the ICESCR. In other words, the Committee reviews state performance in the field of economic, social and cultural rights by examining the reports which states parties to the Covenant are required to submit.

4.1. *The Objectives of the System of State Reports*

The reporting obligation under the ICESCR is more than a formalistic commitment. This mechanism is intended to fulfil a number of important functions. Philip Alston considers these to be the initial review function, the monitoring function, the policy formulation function, the public scrutiny function, the evaluation function, the function of acknowledging problems and the information exchange function.[24] These functions have been repeated by the CESCR in its General Comment No. 1.[25] According to the Committee, the reporting obligation under the Covenant fulfils seven key objectives:

1. It ensures that a state party undertakes a comprehensive review of national legislation, administrative rules and procedures, and practices, in order to assure the fullest possible conformity with the Covenant.
2. It ensures that a state party regularly monitors the actual situation with respect to each Covenant right, in order to assess the extent to which the various rights are being enjoyed by all individuals within the country.
3. It provides a basis for government elaboration of clearly stated and carefully targeted policies for implementing the Covenant.
4. It facilitates public scrutiny of government policies with respect to the Covenant's implementation, and encourages the involvement of the various sectors of society in the formulation, implementation and review of relevant policies.
5. It provides a basis on which both a state party and the Committee can effectively evaluate progress towards the realisation of the obligations contained in the Covenant.

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[24] See Alston, P., "The purposes of reporting", in: *Manual on Human Rights Reporting*, New York: UN, 1991, pp. 14–16 (UN Sales No. E.91.XIV.1).

[25] CESCR, General Comment No. 1 (Third Session, 1989) [UN Doc. E/1989/22] Reporting by States parties [*Compilation*, 2004, pp. 9–11].

6. It enables a state party to develop a better understanding of problems and shortcomings impeding the realisation of the rights of the Covenant.
7. It facilitates the exchange of information among states parties and helps to develop a better understanding of both common problems and possible solutions in the realisation of each of the rights contained in the Covenant.

4.2. *The Contents of State Reports and the Committee Guidelines Regarding the Form and Contents of State Reports*

The effectiveness of a reporting system depends substantially on the quality of reports submitted by states parties. To ensure that state reports are of a good quality, requirements concerning the content of reports must apply. For the ICESCR, as also for the other UN human rights treaties, these exist in the form of reporting guidelines.

State reports under the Covenant consist of two parts, an initial and a special part. The initial part is to be prepared in accordance with guidelines which apply to reports under all of the UN human rights treaties.[26] The guidelines request information on land and people, the general political structure, the general legal framework within which human rights are protected[27] and matters relating to information and publicity.[28] The special part is to be prepared in accordance with guidelines which have been formulated by the CESCR in 1990.[29] The guidelines contain detailed

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[26] The guidelines are contained in the annex to UN Doc. HRI/CORE/1, entitled "Preparation of the initial parts of State party reports ('core documents') under the various international human rights instruments". The said UN human rights treaties are the following: the ICCPR, the ICESCR, the CERD, the CEDAW, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the CRC.

[27] States parties must, for example, provide information on whether any of the rights referred to in the various human rights instruments are protected either in the constitution or by a separate bill of rights, how human rights instruments are made part of the national legal system and whether the provisions of the various human rights instruments can be directly enforced by the courts or whether they must first be transformed into internal laws or administrative regulations.

[28] The topics which states parties must address include *inter alia* the manner and extent to which the texts of the various human rights instruments have been disseminated, what government agencies have responsibility for preparing reports and whether the content of reports is the subject of public debate.

[29] The guidelines are contained in UN Doc. E/C.12/1991/1, entitled "Revised general guidelines regarding the form and contents of reports to be submitted by States parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights". The guidelines were adopted by the CESCR at its fifth session in 1990. For a commentary on the guidelines, see Alston, P., "The International Covenant on Economic, Social and Cultural Rights", in: *Manual on Human Rights Reporting*, New York: UN, 1991, pp. 40 *et seqq.* (UN Sales No. E.91.XIV.1).

questions on the various provisions of the Covenant. The following questions have been formulated with regard to articles 13 and 14 ICESCR:

Article 13 of the Covenant

1. With a view to achieving in your country the full realisation of the right of everyone to education:
   (a) How does your Government discharge its obligation to provide for primary education that is compulsory and available free to all? (If primary education is not compulsory and/or free of charge, see especially article 14.)
   (b) Is secondary education, including technical and vocational secondary education, generally available and accessible to all? To what extent is such secondary education free of charge?
   (c) To what extent is general access to higher education realised in your country? What are the costs of such higher education? Is free education established or being introduced progressively?
   (d) What efforts have you made to establish a system of fundamental education for those persons who have not received or completed the whole period of their primary education?

   In case your Government has recently submitted reports relevant to the situation with respect to the right contained in article 13 to the United Nations or a specialised agency, you may wish to refer to the relevant parts of those reports rather than repeat the information here.
2. What difficulties have you encountered in the realisation of the right to education, as spelt out in paragraph 1? What time-related goals and benchmarks has your Government set in this respect?
3. Please provide statistics on literacy, enrolment in fundamental education with information on rural areas, adult and continuing education, drop-out rates at all levels of education as well as graduating rates at all levels (please disaggregate, if possible, according to sex, religion, *etc*.). Also provide information on measures taken to promote literacy, with data on the scope of the programmes, target population, financing and enrolment, as well as graduation statistics by age group, sex, *etc*. Please report on the positive results of these measures as well as on difficulties and failures.
4. Please provide information on the percentage of your budget (or, if necessary, regional budgets) spent on education. Describe your system of schools, your activity in building new schools, the vicinity of schools, particularly in rural areas, as well as the schooling schedules.
5. To what extent is equal access to the different levels of education and measures to promote literacy enjoyed in practice? For instance:
   (a) What is the ratio of men and women making use of the different levels of education and taking part in these measures?
   (b) With regard to practical enjoyment of the right to these levels of education and measures to promote literacy, are there any particularly vulnerable and disadvantaged groups? Indicate, for instance, to what extent young girls, children of low-income groups, children in rural areas, children who are physically or mentally disabled, children of immigrants and of migrant workers, children belonging to linguistic,

racial, religious or other minorities, and children of indigenous people, enjoy the right to literacy and education spelt out in article [13].

(c) What action is your Government taking or contemplating in order to introduce or guarantee equal access to all levels of education within your country, for instance in the form of anti-discriminatory measures, financial incentives, fellowships, positive or affirmative action? Please describe the effect of such measures.

(d) Please describe the language facilities provided to this effect, such as the availability of teaching in the mother tongue of the students.

6. Please describe the conditions of teaching staff at all levels in your country, having regard to the Recommendation concerning the Status of Teachers, adopted on 5 October 1966 by the Special Intergovernmental Conference on the Status of Teachers, convened by UNESCO. How do teachers' salaries compare to salaries of (other) civil servants? How has this ratio developed over time? What measures does your country take or contemplate to improve the living conditions of teaching staff?
7. What proportion of schools at all levels in your country is not established and administered by the Government? Have any difficulties been encountered by those wishing to establish or to gain access to those schools?
8. During the reporting period, have there been any changes in national policies, laws and practices negatively affecting the right enshrined in article 13? If so, please describe these changes and evaluate their impact.
9. Please indicate the role of international assistance in the full realisation of the right enshrined in article 13.

Article 14 of the Covenant

If compulsory and free primary education in your country is not currently enjoyed, please provide details on the required plan of action for the progressive implementation, within a reasonable number of years fixed in this plan, of this principle. What particular difficulties have you encountered in the realisation of this plan of action? Please indicate the role of international assistance in this respect.

A reading of these questions reveals a number of general content requirements applicable to state reports. For one, state reports must not only report on the *de iure*, but also on the *de facto* position in a state party. Question 5, for example, asks, "To what extent is equal access to the different levels of education and measures to promote literacy enjoyed *in practice*?".[30] Furthermore, the reports of states parties must not only point out successes in implementing the Covenant, but also discuss difficulties in the realisation of Covenant rights. The Committee has remarked in this regard that

[30] Author's italics.

> it would make a mockery of the Covenant and distort its very spirit to suppose that it only obliged States to report on the positive aspects of developments; that would also mean disregarding the preparatory work and the international follow-up of the Covenant.[31]

Question 3, for example, calls upon states parties, "Please report on the positive results of these measures [to promote literacy] *as well as on difficulties and failures*".[32] Moreover, the guidelines request states parties to furnish statistical information and budgetary percentages. This is to assist the CESCR in quantifying what states parties say in their reports. Question 3 invites states parties, "Please provide statistics on literacy, enrolment in fundamental education with information on rural areas, adult and continuing education, drop-out rates at all levels of education as well as graduating rates at all levels". Question 4 invites them, "Please provide information on the percentage of your budget (or, if necessary, regional budgets) spent on education". Finally, reports must supply information on the goals and programmes of governments in realising Covenant rights. Question 2, for example, asks states parties, "What time-related goals and benchmarks has your Government set [in the realisation of the right to education]?".

The detailed nature of the questions is a positive aspect of the Committee's reporting guidelines. This makes it possible to elicit precise responses and to enable states parties to have a clearer idea of what is required.[33] It should, however, be pointed out that the questions do not (in fact, cannot) exhaust the normative content of the various rights provisions of the ICESCR. There are many more aspects to the rights of the Covenant which are not covered by the questions. Many of these need as yet to be identified. This is also true for articles 13 and 14 ICESCR.

Questions 1 and 6 closely follow the structure of article 13(2) ICESCR, which provides for primary, secondary, higher and fundamental education and adequate material conditions for teachers. The question on article 14 enquires on the plan of action prescribed by that article for states parties which have not yet realised compulsory and free primary education. Question 7 relates to article 13(3) and (4) on the freedom of parents to choose for their children private schools and the freedom of individuals to establish such schools. It is rather odd, that no questions are asked on the right of parents to ensure the religious and moral education of their children in conformity with their own convictions, as laid down in article 13(3). The

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[31] Alston, UN Doc. E/C.12/1989/SR.15, para. 87.

[32] Author's italics.

[33] See Craven, 1995, pp. 65–66. When compared with the guidelines regarding periodic reports of the Committee on the Rights of the Child, supervising the CRC, however, it will be noted that the latter Committee's reporting guidelines are much more detailed and structured, and thus more sophisticated, than those of the CESCR. See 8.6. *infra.*

questions, in effect, reveal a certain bias in favour of the social aspect, somewhat neglecting the freedom aspect of the right to education. The dangers of such an approach have been discussed above.[34] It is further strange, that the CESCR's reporting guidelines contain no questions concerning the aims of education in article 13(1).

The remaining questions relate to article 13 in a more general sense. Questions 3 and 4 ask for statistical information and budgetary percentages concerning the national education system. Question 8 requests data on the national education policy. Question 5 addresses the topic of equal access to education. Emphasis is placed on the position of girls and women and vulnerable groups, such as migrant workers, members of minorities and persons of indigenous origin. Finally, question 2 enquires on difficulties encountered in the realisation of the right to education and question 9 calls upon states parties to indicate the role of international assistance in the realisation of article 13.[35]

4.3. *The* Modus Operandi *of the Committee on Economic, Social and Cultural Rights*[36]

The CESCR typically schedules about five state reports for consideration during any given session.[37]

The reports of states are first reviewed by a Pre-Sessional Working Group, which meets prior to each of the Committee's sessions.[38] The Working Group's task is to consider state reports and then to formulate a List of Issues with regard to each report, based on problematic points arising from the report.[39] The List of Issues is transmitted to the state party

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[34] See 2.8. *supra*.

[35] Gebert, 1996, p. 60 considers it unfortunate that the questions on arts. 13 and 14 ICESCR do not refer to UNESCO's normative instruments in the field of education in a general and systematic manner. Only question 6 refers to a UNESCO instrument.

[36] For a recent account of the CESCR's working methods, see UN Doc. E/2004/22, paras. 23–54.

[37] In terms of Rule 62(3) Rules of Procedure (see note 10), "[o]nce a State party has agreed to the scheduling of its report for consideration by the Committee, the Committee will proceed with the examination of that report at the time scheduled, even in the absence of a representative of the State party".

[38] ECOSOC authorised the creation of the Pre-Sessional Working Group in ECOSOC Resolution 1988/4, para. 10.

[39] In practice, the Working Group appoints one of its members as country rapporteur with regard to each report, with the initial responsibility for undertaking a detailed review of the report. Throughout the reporting procedure, the country rapporteur has the following duties: He must prepare a preliminary List of Issues, he must "lead" the discussion, both during the pre-session and session, and he must prepare a draft set of Concluding Observations.

concerned, the latter being urged to submit a written Reply to the List of Issues in advance of the session at which its report will be considered.

At the relevant session, the reports are then considered by the full Committee. In terms of Rule 62(1) Rules of Procedure,[40] "[r]epresentatives of the reporting States are entitled to be present at the meetings of the Committee when their reports are examined" and ". . . should be able to make statements on the reports submitted by their States and reply to questions which may be put to them by the members of the Committee". In practice, the procedure adopted is as follows:[41] The representative of the state party first introduces the report by making introductory comments and by introducing any written Reply to the List of Issues. Thereafter, the Committee considers the report. Members of the Committee may put questions to the state party's representatives, which the latter are invited to answer. Questions which require further reflection may be taken up at a subsequent meeting. Representatives of the UN Specialised Agencies may be invited to contribute at any stage of the dialogue.[42] The final phase of the consideration of the report consists of the drafting and adoption of "Concluding Observations". Immediately after the conclusion of the dialogue, the Committee meets in closed session,[43] to enable members to express preliminary views. A draft set of "Concluding Observations" will then be prepared. At a later stage, the Committee then discusses the draft, again in closed session, with a view to adopting it. The "Concluding Observations" are usually not made public until the final day of the session. They are then forwarded to the state party concerned. The state party may, if it so wishes, address any of the "Concluding Observations" in the context of any additional information which it provides to the Committee. "Concluding Observations" are meant to be widely publicised in states parties and to serve as the basis for a national debate on how to improve the enforcement of the provisions of the Covenant.

The Committee is required to submit an annual/sessional report to ECOSOC, in which it reports on its activities. The report must contain the Concluding Observations of the Committee relating to each state party's report, and also suggestions and recommendations of a general nature, made to assist ECOSOC to fulfil its duties under articles 21 and 22 ICESCR.[44]

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[40] See note 10.

[41] For a description of the procedure, see UN Doc. E/2004/22, paras. 33–36.

[42] Rule 68 Rules of Procedure (see note 10) provides for the participation of the UN Specialised Agencies.

[43] For the rest, the discussion is open to the public. Representatives of NGOs, journalists and interested individuals are free to attend.

[44] See ECOSOC Resolution 1985/17, para. (f). See also Rule 57 Rules of Procedure

Although the CESCR's mandate, in terms of Resolution 1985/17, is merely that of assisting ECOSOC, the Committee has shown itself to be creative in interpreting its formally limited mandate.[45] The Committee has, for example, in the case of states parties whose reports are considerably overdue, adopted the practice of notifying such states parties of its intention to consider these reports at specified future sessions. If no reports are forthcoming, the Committee proceeds to consider the status of economic, social and cultural rights in the states parties concerned in the light of all available information. The Committee considers this to be necessary, opining that "a situation of persistent non-reporting by States parties risks bringing the entire supervisory procedure into disrepute, thereby undermining one of the foundations of the Covenant".[46] Noteworthy is further that the Committee makes use of "follow-up" procedures. A number of possibilities have been developed by the Committee in this regard.[47] In its Concluding Observations, the Committee will request states parties to inform it in their next report about steps taken to implement the recommendations in the Concluding Observations. It may further make a specific request to a state party to provide more information prior to the date that the next report is due to be submitted, or ask the state party to respond to any pressing specific issue identified in the Concluding Observations prior to the said date.[48] In cases where the Committee holds that it is unable to obtain the

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(see note 10). The following Committee reports exist: First Session (1987), UN Doc. E/1987/28; Second Session (1988), UN Doc. E/1988/14; Third Session (1989), UN Doc. E/1989/22; Fourth Session (1990), UN Doc. E/1990/23; Fifth Session (1990), UN Doc. E/1991/23; Sixth Session (1991), UN Doc. E/1992/23; Seventh Session (1992), UN Doc. E/1993/22; Eighth and Ninth Sessions (1993), UN Doc. E/1994/23; Tenth and Eleventh Sessions (1994), UN Doc. E/1995/22; Twelfth and Thirteenth Sessions (1995), UN Doc. E/1996/22; Fourteenth and Fifteenth Sessions (1996), UN Doc. E/1997/22; Sixteenth and Seventeenth Sessions (1997), UN Doc. E/1998/22; Eighteenth and Nineteenth Sessions (1998), UN Doc. E/1999/22; Twentieth and Twenty-First Sessions (1999), UN Doc. E/2000/22; Twenty-Second, Twenty-Third and Twenty-Fourth Sessions (2000), UN Doc. E/2001/22; Twenty-Fifth, Twenty-Sixth and Twenty-Seventh Sessions (2001), UN Doc. E/2002/22; Twenty-Eighth and Twenty-Ninth Sessions (2002), UN Doc. E/2003/22; and Thirtieth and Thirty-First Sessions (2003), UN Doc. E/2004/22. There further exist Summary Records with regard to every meeting of a session.

[45] See the article of Coomans, 1997, pp. 553–568, in which he discusses how the CESCR has developed its mandate in an innovative manner.

[46] See UN Doc. E/1993/22, paras. 39–41.

[47] See UN Doc. E/2000/22, paras. 38–41. See also Rule 63 Rules of Procedure (see note 10), which deals with the topic of requests for additional information.

[48] Any information provided is considered by the next meeting of the Committee's Pre-Sessional Working Group. The Working Group may recommend to the Committee that it take note of such information, that it adopt specific additional Concluding Observations in response to that information, that the matter be pursued through a request for further information, or that it inform the state party concerned that it will take up the issue at its next session and that for that purpose the participation of a representative of the state party would be welcome.

information it requires on the basis of the above procedures, it may request a state party to accept a mission of one or two of its members to visit it to collect the necessary information in that state party. In one case, the Committee called upon a state party to supply information concerning a new situation brought to its attention after the session at which the report of that state party had been considered.[49] Strictly, this does not qualify as follow-up action, but points to the development of an *ad hoc* reporting procedure.[50]

Above it has been stated that the CESCR considers itself to be involved in a constructive dialogue with states parties, but that, at the same time, one may discern distinct quasi-judicial elements in its working methods. The following three factors have contributed to the development of these elements, namely, the Committee's ability to receive what may be considered "communications" from NGOs, its competence to direct Concluding Observations containing state-specific evaluations to states parties, and the Committee's power to issue General Comments.[51] The first two factors will be addressed now, the argument concerning General Comments will be dealt with further below.[52]

Rule 69 Rules of Procedure[53] provides for the submission of information by, amongst others, NGOs.[54] In terms of Rule 69(1), NGOs in consultative status with ECOSOC may submit to the Committee "written statements that might contribute to full and universal recognition and realisation of the rights contained in the Covenant". Provision is further made by Rule 69(2) and (3) for NGOs to present oral information to the Pre-Sessional Working Group and to the Committee itself.[55] Information

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[49] The CESCR had considered the report of the Dominican Republic at its fifth session. Subsequently, new cases of violation were alleged. The CESCR thereupon required the Dominican Republic to provide additional information "as a matter of urgency". See UN Doc. E/1991/23, para. 330.

[50] See Craven, 1994, pp. 106–109.

[51] See *ibidem* at pp. 99–104.

[52] See 8.5.2. *infra*.

[53] See note 10.

[54] Rule 69 is based on the procedure regarding the participation of NGOs in the CESCR's activities, adopted by the Committee at its eighth session in 1993. See UN Doc. E/1994/23, para. 354. The basic principles of the procedure have since been supplemented by the practice of the Committee. At the twenty-fourth session in 2000, the Committee adopted the text of a note by the Secretariat, entitled "Non-governmental organisation participation in the activities of the Committee on Economic, Social and Cultural Rights" (UN Doc. E/C.12/2000/6), which updates the procedure for NGO participation in the Committee's activities. The text of the note is contained in UN Doc. E/2001/22, Annex V. On the role of NGOs in the Committee's activities, see Craven, 1995, pp. 80–83.

[55] Rule 69(2) states, "In addition to the receipt of written information, a short period of time will be made available at the beginning of each session of the Committee's pre-sessional working group to provide NGOs with an opportunity to submit relevant oral information to the members of the working group". Rule 69(3) states in part, "Furthermore,

from NGOs will invariably involve allegations that states parties have violated the Covenant. Although the Committee is not obliged to consider such information, it will in practice expect state representatives to answer questions in this regard. In a sense, therefore, the Committee may be said to be able to receive "communications", its power being limited though to cases where a state report is due. Matthew Craven considers that the Committee's ability to receive "communications", particularly when placed in the context of its apparent competence to call for *ad hoc* reports, alluded to above, may develop into an "unofficial petition procedure".[56]

Technically, the CESCR is merely authorised to make suggestions and recommendations of a general nature to assist ECOSOC to fulfil its responsibilities under articles 21 and 22 ICESCR.[57] Since its second session, however, the Committee concludes its consideration of state reports with the adoption of Concluding Observations on each report.[58] Originally, Concluding Observations only provided an evaluation of a state report and of the manner in which questions were answered, in writing and orally, prior to and during the consideration of the report by the Committee. Subsequently, however, they also began commenting on the degree of realisation of Covenant rights in a state party. The CESCR recognised the need

> to focus not only on the extent to which the report and the other information . . . were satisfactory or not, but also on the extent to which the situation in the country concerned in terms of realisation of the rights contained in the Covenant was satisfactory.[59]

Since the eighth session, Concluding Observations consist of five parts. There is a short "Introduction", a section on "Positive aspects", one on "Factors and difficulties impeding the implementation of the Covenant", another on "Principal subjects of concern" and a section which includes "Suggestions and recommendations" addressed to the state party.[60] The

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the Committee will set aside part of the first afternoon at each of its sessions to enable it to receive oral information provided by NGOs. Such information should: (a) focus specifically on the provisions of the [ICESCR]; (b) be of direct relevance to matters under consideration by the Committee; (c) be reliable, and (d) not be abusive".

[56] See Craven, 1994, pp. 91–113, particularly at p. 99 and pp. 106–109.

[57] See ECOSOC Resolution 1985/17, para. (f). See also Rule 64 Rules of Procedure (see note 10), which states in part, "The Committee shall make suggestions and recommendations of a general nature on the basis of its consideration of reports submitted by States parties and of the reports submitted by the specialised agencies in order to assist the Council to fulfil, in particular, its responsibilities under articles 21 and 22 of the Covenant".

[58] On the CESCR's Concluding Observations, see Craven, 1995, pp. 87–89 and Arambulo, 1999, pp. 42–44. In addition to Concluding Observations, letters from the chairperson are sometimes addressed to states parties informing them of the Committee's concerns.

[59] UN Doc. E/1993/22, para. 263.

[60] Since the eighth session, the CESCR's Concluding Observations thus follow the same

section on "Principal subjects of concern" is of particular interest. Its formulations indicate, whether an unsatisfactory situation regarding the realisation of a particular Covenant right may be considered to constitute a violation of that right.[61] In its early years, the Committee generally refrained from expressing dissatisfaction with the situation in certain countries. The turning point in the Committee's approach came during its fifth session with regard to the consideration of the report submitted by the Dominican Republic. Information placed at the Committee's disposal attested to the forcible eviction of some 15 000 families from their homes in the country concerned. The Committee found that the Dominican Republic had not respected the guarantees in article 11 ICESCR.[62] Ever since, the Committee has been less reticent to express its dissatisfaction with an unsatisfactory situation concerning the implementation of Covenant rights in states parties. The tone of the Committee in its Concluding Observations varies. It may recommend to a state party that it should take appropriate measures to improve a particular situation. It may also express its concern about the situation in a state party. In serious cases, the Committee considers a Covenant right to have been infringed. The fact that the Committee makes such state-specific evaluations, reflects its willingness to develop quasi-judicial features in its approach to the supervision of the ICESCR.[63]

Concluding Observations do not carry legally binding status. They are, nevertheless, indicative of the opinion of a capable expert body. Accordingly, for states parties to ignore this opinion would be to show *mala fides* in implementing their obligations under the ICESCR.

Chapter 11 will examine the CESCR's Concluding Observations, in as far as they address the right to education in article 13 ICESCR, in an effort to discern the Committee's understanding of the content of that right. In the absence of an individual petition procedure to the ICESCR, the adoption of Concluding Observations constitutes the most important method of clarifying the normative content of Covenant rights, if the holding of Days of General Discussion and the issuing of General Comments by the Committee are left out of consideration for the moment.

A final matter concerning the CESCR's working methods relates to the

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structure as those of the Human Rights Committee and the Committee on the Rights of the Child.

[61] See Coomans, 1997, p. 555.

[62] See UN Doc. E/1991/23, para. 249.

[63] See Craven, 1994, pp. 101–104. Alston, UN Doc. E/CN.4/1997/74, para. 109 holds that although the practice of formulating Concluding Observations "constitutes a major step forward there is still considerable room for improvement in the quality of the concluding observations, especially in terms of clarity, degree of detail, level of accuracy and specificity".

issue of technical assistance and the role of the Committee in this regard.[64] Article 22 ICESCR, cited in full above,[65] provides that ECOSOC may bring to the attention of the various organs of the UN, their subsidiary organs and the Specialised Agencies concerned with furnishing technical assistance any matters arising out of state reports which may assist such bodies in deciding on the provision of technical assistance to states parties aimed at the effective implementation of the ICESCR. The primary responsibility under article 22 is vested in ECOSOC. Nevertheless, the Committee considers it appropriate "to play an active role in advising and assisting the Council in this regard".[66] The Committee itself is not authorised to provide technical assistance. Instead, it makes recommendations concerning technical assistance. If considered necessary, the CESCR recommends to states parties in its Concluding Observations that they seek technical assistance from the relevant UN organs or agencies. In effect, when state reports indicate a need or contain a request for technical assistance, the Committee refers the matter to the UN organ or agency concerned.[67] The Committee may also recommend to states parties that they avail themselves of the technical assistance which the Office of the UNHCHR provides, to assist states parties in the preparation of their reports.[68]

5. *The Normative Function of the Committee on Economic, Social and Cultural Rights: Days of General Discussion and General Comments*

The normative function refers to the CESCR's practice of holding Days of General Discussion and of issuing General Comments. Both of these activities are aimed at clarifying the normative content of provisions of the ICESCR.

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[64] The CESCR has adopted a General Comment on the topic of technical assistance, namely General Comment No. 2 (Fourth Session, 1990) [UN Doc. E/1990/23] International technical assistance measures (art. 22 ICESCR) [*Compilation*, 2004, pp. 12–14].

[65] See 8.2. *supra*.

[66] General Comment No. 2, see note 64, para. 1.

[67] Para. 10 General Comment No. 2, see note 64, states as follows, ". . . the Committee wishes to draw attention to the important opportunity provided to States parties, in accordance with article 22 of the Covenant to identify in their reports any particular needs they might have for technical assistance or development co-operation".

[68] The Office of the UNHCHR administers a programme of advisory services with regard to the ICESCR.

5.1. *Days of General Discussion*

It has become the practice of the CESCR to devote one day at each session to a general discussion of a particular right or of a particular aspect of the ICESCR. The day "assists the Committee in developing in greater depth its understanding of the relevant issues, it enables the Committee to encourage inputs into its work from all interested parties, and helps to lay the basis for a future general comment".[69] In the discussions held so far, the Committee has sought to draw widely on the available expertise. It has invited Special Rapporteurs of the UN Commission on Human Rights or its Sub-Commission on the Promotion and Protection of Human Rights (formerly the Sub-Commission on Prevention of Discrimination and Protection of Minorities), representatives of the Specialised Agencies and other UN organs, representatives from NGOs, and also independent experts. Days of General Discussion are of importance in developing the normative framework of the ICESCR. They help Committee members to improve their understanding of the legal nature of Covenant rights. The said understanding in turn is reflected in the Committee's Concluding Observations and its General Comments, and may thus assist states parties to better comprehend the rights of the Covenant. The Committee customarily summarises the general discussions in its annual/sessional reports. These summaries, however, give little indication of common agreement. It is unfortunate that the Committee does not draw up a number of general principles that show common agreement at the end of debates.

On 30 November 1998, during its nineteenth session, the CESCR held a Day of General Discussion devoted to the right to education, as laid

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[69] UN Doc. E/2004/22, para. 45. On the CESCR's Days of General Discussion, see Craven, 1995, pp. 92–94. So far, the Committee has held Days of General Discussion on the following topics: the right to food (Third Session, 1989); the right to housing (Fourth Session, 1990); economic and social indicators (Sixth Session, 1991); the right to take part in cultural life (Seventh Session, 1992); the rights of the ageing and elderly (Eighth Session, 1993); the right to health (Ninth Session, 1993); the role of social safety nets (Tenth Session, 1994); human rights education and public information activities (Eleventh Session, 1994); the interpretation and practical application of the obligations incumbent on States parties (Twelfth Session, 1995); a draft optional protocol to the Covenant (Thirteenth Session, 1995, and Fourteenth and Fifteenth Sessions, 1996); revision of the general guidelines for reporting (Sixteenth Session, 1997); the normative content of the right to food (Seventeenth Session, 1997); globalisation and its impact on the enjoyment of economic, social and cultural rights (Eighteenth Session, 1998); the right to education (Nineteenth Session, 1998); the right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author (Twenty-Fourth Session, 2000); international consultation on economic, social and cultural rights in development activities of international institutions (Twenty-Fifth Session, 2001); the equal right of men and women to the enjoyment of economic, social and cultural rights set forth in the ICESCR (Twenty-Eighth Session, 2002); and the right to work (Thirty-First Session, 2003).

down in articles 13 and 14 ICESCR.[70] The participants included Katarina Tomaševski, as Special Rapporteur of the UN Commission on Human Rights on the Right to Education, Mustapha Mehedi, as Member of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, representatives of the Specialised Agencies and other UN organs (UNESCO, UNICEF, UNDP),[71] representatives from NGOs,[72] and several independent experts.[73] A number of useful background papers were made available to the Committee.[74] The debate covered the aspects of education as a human right and the right to education in the context of the indivisibility of human rights; co-operation among UN organs and Specialised Agencies, including the human rights treaty bodies: partnership for the realisation of the right to education; the relevance of the normative approach; the core content of the right to education; and the nature of state obligations, indicators and benchmarks.

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[70] See the CESCR's Summary Records of the 49th and 50th Meetings, contained in UN Docs. E/C.12/1998/SR.49 and E/C.12/1998/SR.50, respectively, and its Report on the Eighteenth and Nineteenth Sessions, contained in UN Doc. E/1999/22, paras. 462–514. Special note should also be taken of the Committee's Day of General Discussion on human rights education in 1994.

[71] The following representatives of Specialised Agencies and other UN organs participated in the debate: A. Cassam, Director, UNESCO Liaison Office in Geneva; B. Coppens, Regional Representative and Director a.i., European Office, UNDP; W. Gordon, Director, Section for Primary Education, Division of Basic Education, Education Sector, UNESCO; B. Ogun-Bassani, Deputy Director, Regional Office for Europe, UNICEF; and K. Savolainen, Director, Department of Education for a Culture of Peace, Education Sector, UNESCO.

[72] The following representatives of NGOs participated in the debate: R. Bonner, International Baccalaureate Organisation; A. Fernandez, International Organisation for the Development of Freedom of Education (OIDEL); M. Kothari, Habitat International Coalition; M. Moya, American Association of Jurists; and C. Poncini, International Federation of University Women.

[73] The following independent experts participated in the debate: F. Coomans, Maastricht University (Netherlands); P. Hunt, University of Waikato (New Zealand); G. Kent, University of Hawaii (USA); and P. Meyer-Bisch, University of Fribourg (Switzerland).

[74] The following background papers were made available: Chapman, A. and S. Russell, *Violations of the Right to Education* (UN Doc. E/C.12/1998/19), Coomans, F., *The Right to Education as a Human Right: An Analysis of Key Aspects* (UN Doc. E/C.12/1998/16), Fernandez, A. and J.-D. Nordmann, *Right to Education: Survey and Prospects* (UN Doc. E/C.12/1998/14), Ferrer, F., *The Right to Education and Programmes to Remedy Inequalities* (UN Doc. E/C.12/1998/20), Hunt, P., *State Obligations, Indicators, Benchmarks and the Right to Education* (UN Doc. E/C.12/1998/11), Kempf, I., *How to Measure the Right to Education: Indicators and their Potential Use by the Committee on Economic, Social and Cultural Rights* (UN Doc. E/C.12/1998/22), Kent, G., *The Right to Quality Education* (UN Doc. E/C.12/1998/13), Meyer-Bisch, P., *The Right to Education in the Context of Cultural Rights* (UN Doc. E/C.12/1998/17), Gomez del Prado, J., *Comparative Analysis of the Right to Education as Enshrined in Articles 13 and 14 of the International Covenant on Economic, Social and Cultural Rights and Provisions Contained in Other Universal and Regional Treaties, and the Machinery Established, if Any, for Monitoring its Implementation* (UN Doc. E/C.12/1998/23), Tomaševski, K., *The Right to Education* (UN Doc. E/C.12/1998/18), World University Service, *The Right to Education* (UN Doc. E/C.12/1998/15), and Zachariev, Z., *Considerations on Indicators of the Right to Education* (UN Doc. E/C.12/1998/21).

Note should also be taken of the meeting which the CESCR held with UNESCO (the first ever with a UN Specialised Agency) on 14 May 2002, during the Committee's twenty-eighth session, on follow-up to the Day of General Discussion on the right to education and to the World Education Forum, held at Dakar, Senegal from 26 to 28 April 2000. Other UN Specialised Agencies and Programmes as well as NGOs participated at the meeting.[75]

5.2. *General Comments*

Responding to an invitation by ECOSOC,[76] the CESCR decided to begin, as from its third session, to issue General Comments, intended to define provisions of the ICESCR or related topics more clearly "with a view to assisting the States parties in fulfilling their reporting obligations".[77] Once adopted, a General Comment is included in the Committee's annual/sessional report to ECOSOC, and it is brought to the attention of the General Assembly. With its General Comments, the Committee aims

> to make the experience gained so far through the examination of States' reports available for the benefit of all States parties in order to assist and

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[75] See the CESCR's Summary Record of the 22nd Meeting, contained in UN Doc. E/C.12/2002/SR.22 and its Report on the Twenty-Eighth and Twenty-Ninth Sessions, contained in UN Doc. E/2003/22, paras. 544–589.

[76] See ECOSOC Resolution 1987/5, 26 May 1987, para. 9.

[77] UN Doc. E/1988/14, para. 367. On the CESCR's General Comments, see Craven, 1995, pp. 89–92. So far, the Committee has issued the following General Comments: General Comment No. 1 (Third Session, 1989) [UN Doc. E/1989/22] Reporting by States parties; General Comment No. 2 (Fourth Session, 1990) [UN Doc. E/1990/23] International technical assistance measures (art. 22 ICESCR); General Comment No. 3 (Fifth Session, 1990) [UN Doc. E/1991/23] The nature of States parties' obligations (art. 2(1) ICESCR); General Comment No. 4 (Sixth Session, 1991) [UN Doc. E/1992/23] The right to adequate housing (art. 11(1) ICESCR); General Comment No. 5 (Eleventh Session, 1994) [UN Doc. E/1995/22] Persons with disabilities; General Comment No. 6 (Thirteenth Session, 1995) [UN Doc. E/1996/22] The economic, social and cultural rights of older persons; General Comment No. 7 (Sixteenth Session, 1997) [UN Doc. E/1998/22] The right to adequate housing (art. 11(1) ICESCR): forced evictions; General Comment No. 8 (Seventeenth Session, 1997) [UN Doc. E/1998/22] The relationship between economic sanctions and respect for economic, social and cultural rights; General Comment No. 9 (Nineteenth Session, 1998) [UN Doc. E/1999/22] The domestic application of the Covenant; General Comment No. 10 (Nineteenth Session, 1998) [UN Doc. E/1999/22] The role of national human rights institutions in the protection of economic, social and cultural rights; General Comment No. 11 (Twentieth Session, 1999) [UN Doc. E/2000/22] Plans of action for primary education (art. 14 ICESCR); General Comment No. 12 (Twentieth Session, 1999) [UN Doc. E/2000/22] The right to adequate food (art. 11 ICESCR); General Comment No. 13 (Twenty-First Session, 1999) [UN Doc. E/2000/22] The right to education (art. 13 ICESCR); General Comment No. 14 (Twenty-Second Session, 2000) [UN Doc. E/2001/22] The right to the highest attainable standard of health (art. 12 ICESCR); and General Comment No. 15 (Twenty-Ninth Session, 2002) [UN Doc. E/2003/22] The right to water (arts. 11 and 12 ICESCR).

> promote their further implementation of the Covenant; to draw the attention of the States parties to insufficiencies disclosed by a large number of reports; to suggest improvements in the reporting procedures; and to stimulate the activities of the States parties, international organisations and the specialised agencies concerned in achieving progressively and effectively the full realisation of the rights recognised in the Covenant.[78]

The use of General Comments is an important mechanism for the Committee to develop jurisprudence on the ICESCR.[79] A study of the Committee's General Comments reveals that these are prescriptive—rather than descriptive—in character. Instead of merely describing Committee practice, they interpret Covenant provisions in an abstract way. Such a general power of interpretation

> would be more closely associated with bodies that exercise quasi-judicial functions than with ones concerned merely with the provision of advice and assistance.[80]

General Comments are not legally binding. Undoubtedly, however, they have considerable legal weight. In accordance with article 31(3)(b) of the Vienna Convention on the Law of Treaties, "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" is to be taken into account in construing the treaty. States parties' participation in the supervisory processes of the ICESCR, as part of which General Comments are being issued, may be seen to reflect such practice. The endorsement of General Comments by ECOSOC and by the General Assembly adds importance to the Committee's interpretation.

Of particular importance is the Committee's General Comment No. 3.[81] It elaborates on the central provision of the ICESCR, article 2(1). Article 2(1) describes the general nature of states parties' obligations under the Covenant. The General Comment will be referred to below when discussing article 2(1).[82]

In 1999, during its twentieth and twenty-first sessions, the Committee adopted two General Comments devoted to the right to education. General

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[78] UN Doc. E/2004/22, para. 52.

[79] At the twenty-first session, the CESCR adopted an "Outline for drafting General Comments on specific rights of the International Covenant on Economic, Social and Cultural Rights". The outline is intended to ensure consistency and clarity in the structure of General Comments and thus to strengthen the authoritative interpretation of the Covenant provided by the Committee through its General Comments. The outline is contained in UN Doc. E/2000/22, Annex IX.

[80] Craven, 1994, p. 101. See *ibidem* at pp. 99–101.

[81] CESCR, General Comment No. 3 (Fifth Session, 1990) [UN Doc. E/1991/23] The nature of States parties' obligations (art. 2(1) ICESCR) [*Compilation*, 2004, pp. 15–18].

[82] See 9.2. *infra.*

Comment No. 11 deals with plans of action for compulsory and free primary education under article 14 ICESCR.[83] General Comment No. 13 concerns the right to education under article 13 ICESCR.[84]

General Comment No. 11 emphasises the importance of compulsory and free primary education. Under article 14 ICESCR, states parties which do not as yet secure compulsory and free primary education are called upon to work out and adopt a detailed plan of action, providing for the progressive implementation of the principle of compulsory and free primary education. The General Comment defines the terms "compulsory" and "free of charge" in paragraphs 6 and 7, respectively. In paragraph 8, it explains how the phrase "adoption of a detailed plan" should be interpreted, in paragraph 9 what the nature of the "obligations" under article 14 is, and in paragraph 10 the way the notion of "progressive implementation" in article 14 should be construed. General Comment No. 11 will be referred to below when discussing the implementation of article 13(2)(a) ICESCR, dealing with primary education.[85]

General Comment No. 13 has been prepared with a view to assisting states parties' implementation of article 13 ICESCR on the right to education and fulfilment of their reporting obligation in this regard.[86] It deals with the following aspects:

Part I: The normative content of article 13 (paragraphs 4 to 42)

- article 13(1): aims and objectives of education (paragraphs 4 to 5);
- article 13(2): the right to receive an education—some general remarks (paragraphs 6 to 7);
- article 13(2)(a): the right to primary education (paragraphs 8 to 10);
- article 13(2)(b): the right to secondary education (paragraphs 11 to 14);
  - technical and vocational education (paragraphs 15 to 16);
- article 13(2)(c): the right to higher education (paragraphs 17 to 20);
- article 13(2)(d): the right to fundamental education (paragraphs 21 to 24);
- article 13(2)(e): a school system; adequate fellowship system; material conditions of teaching staff (paragraphs 25 to 27);

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[83] CESCR, General Comment No. 11 (Twentieth Session, 1999) [UN Doc. E/2000/22] Plans of action for primary education (art. 14 ICESCR) [*Compilation*, 2004, pp. 60–63]. The full text of the General Comment is included in the Annex to this book.

[84] CESCR, General Comment No. 13 (Twenty-First Session, 1999) [UN Doc. E/2000/22] The right to education (art. 13 ICESCR) [*Compilation*, 2004, pp. 71–86]. The full text of the General Comment is included in the Annex to this book.

[85] See 10.4.2.4. *infra*.

[86] General Comment No. 13, see note 84, para. 3.

- article 13(3) and (4): the right to educational freedom (paragraphs 28 to 30);
- article 13: special topics of broad application (paragraphs 31 to 42):
  - non-discrimination and equal treatment (paragraphs 31 to 37);
  - academic freedom and institutional autonomy (paragraphs 38 to 40);
  - discipline in schools (paragraph 41);
  - limitations on article 13 (paragraph 42);

Part II: States parties' obligations and violations (paragraphs 43 to 59)

- general legal obligations (paragraphs 43 to 48);
- specific legal obligations (paragraphs 49 to 57);
- violations (paragraphs 58 to 59);

and

Part III: The obligations of actors other than states parties (paragraph 60).

General Comment No. 13 will be extensively referred to below when discussing article 13 ICESCR on the right to education.[87]

But, also certain other of the Committee's General Comments contain observations relevant to the right to education. General Comment No. 5 on persons with disabilities, for example, addresses the right to education of disabled persons.[88] Similarly, General Comment No. 6 on the ESCR of older persons deals with the right to education of older persons.[89] In General Comment No. 8 on the relationship between economic sanctions and respect for ESCR, the Committee observes that economic sanctions may severely interfere with the functioning of education systems and expresses concern about the fact that access to primary education is not included amongst the humanitarian exemptions of the sanctions regimes of the UN Security Council.[90] General Comment No. 9 on the domestic application of the ICESCR recognises the justiciability of article 13(2)(a), (3) and (4).[91] General Comment No. 14 on the right to health holds that health education is a

[87] See Chapter 10 *infra*.

[88] CESCR, General Comment No. 5 (Eleventh Session, 1994) [UN Doc. E/1995/22] Persons with disabilities [*Compilation*, 2004, pp. 25–35], para. 35. See note 176 in Chapter 4.

[89] CESCR, General Comment No. 6 (Thirteenth Session, 1995) [UN Doc. E/1996/22] The economic, social and cultural rights of older persons [*Compilation*, 2004, pp. 35–45], paras. 36–38. See 4.9. *supra*.

[90] CESCR, General Comment No. 8 (Seventeenth Session, 1997) [UN Doc. E/1998/22] The relationship between economic sanctions and respect for economic, social and cultural rights [*Compilation*, 2004, pp. 51–55], paras. 3 and 5.

[91] CESCR, General Comment No. 9 (Nineteenth Session, 1998) [UN Doc. E/1999/22] The domestic application of the Covenant [*Compilation*, 2004, pp. 55–59], para. 10.

core obligation arising from the right to health.[92] Finally, General Comment No. 15 on the right to water emphasises that sufficient, safe and acceptable water must be accessible within schools.[93]

6. *By Way of Comparison: Supervision Under the Convention on the Rights of the Child*

Supervision under the CRC is similar to that in terms of the ICESCR. Like the ICESCR, the CRC knows no petition procedures and only provides for a reporting system.[94] Article 44(1) CRC obliges states parties to submit reports on the measures adopted to give effect to the rights of the CRC and on the progress made on the enjoyment of those rights. Article 44(2) requires the reports of states to mention factors and difficulties affecting fulfilment of the obligations under the Convention. Reports must be submitted within two years of the entry into force of the CRC for the state party concerned and thereafter every five years.[95]

Supervision of the CRC is entrusted to the Committee on the Rights of the Child (ComRC),[96] a body consisting of eighteen experts of recognised competence in the field of children's rights, who serve in a personal capacity.[97] The Committee currently holds three sessions a year, each of up to three weeks' duration.[98] It is serviced by the Office of the UNHCHR. Every two years, the Committee must report to the General Assembly on its activities.[99] Unlike the CESCR, which is based on the UN Charter, the ComRC is an autonomous treaty body.

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[92] CESCR, General Comment No. 14 (Twenty-Second Session, 2000) [UN Doc. E/2001/22] The right to the highest attainable standard of health (art. 12 ICESCR) [*Compilation*, 2004, pp. 86–106], para. 44(d).

[93] CESCR, General Comment No. 15 (Twenty-Ninth Session, 2002) [UN Doc. E/2003/22] The right to water (arts. 11 and 12 ICESCR) [*Compilation*, 2004, pp. 106–123], paras. 12(c)(i) and 16(b).

[94] The supervisory system of the CRC is discussed in UN Doc. CRC/C/33 (1994), entitled "Overview of the reporting procedures". See also UNHCHR, *Human Rights Fact Sheet No. 10 (Rev. 1): The Rights of the Child*, Geneva: UN, undated.

[95] Art. 44(1) CRC. The ComRC has adopted Provisional Rules of Procedure. They are contained in UN Doc. CRC/C/4 (1991).

[96] Art. 43(1) CRC.

[97] Art. 43(2) CRC, as amended. The amendment increases the number of members from 10 to 18.

[98] Currently, about nine state reports are considered during any given session. As from 2006, the ComRC will meet in two chambers to enable it to deal with sixteen state reports per session.

[99] Art. 44(5) CRC. The following reports of the ComRC to the General Assembly exist: UN Docs. A/47/41 (1992); A/49/41 (1994); A/51/41 (1996); A/53/41 (1998); A/55/41 (2000); A/57/41 (2002); and A/59/41 (2004).

Also the ComRC has formulated guidelines regarding the form and content of state reports to help states parties writing and structuring their reports. There exist guidelines applicable to states parties' initial reports[100] and guidelines applicable to their periodic reports.[101] When the latter are compared with the CESCR guidelines, it will be noted that they are much more detailed. This has the advantage that states parties may more readily understand which aspects are, in fact, covered by a specific right. The questions provide an indication of what the ComRC considers to be the normative content of rights of the CRC. In order to facilitate a more structured discussion, the guidelines group the articles according to content and in a logical order. Questions on the right to education are thus encountered in the group "education, leisure and cultural activities (articles 28, 29 and 31)". But also other groups include questions concerning the right to education, for example, the group "basic health and welfare", in as far as it enquires on article 23 concerning disabled children, and the group "special protection measures", in as far as it enquires on articles 22, 32 and 30 concerning refugee children, the economic exploitation of children, including child labour, and children belonging to a minority or an indigenous group, respectively.

The ComRC's working methods are similar to those of the CESCR. The ComRC endeavours to enter into a "constructive dialogue" with states parties. State reports are first dealt with by a Pre-Sessional Working Group and thereafter by the Committee itself. State representatives may attend the meetings of the Committee when their reports are considered.[102] The discussion is concluded with the adoption by the Committee of "Concluding Observations".[103] There is a procedure, in terms of which the Committee may examine the status of children's rights in states parties whose reports are considerably overdue, in the absence of a report, in the light of all relevant information.[104] There also exist various follow-up procedures. In particular, further information may be requested from states parties.[105] It

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[100] The guidelines regarding initial reports are contained in UN Doc. CRC/C/5 (1991), entitled "General guidelines regarding the form and content of initial reports to be submitted by States parties under article 44, para. 1(a), of the Convention".

[101] The guidelines regarding periodic reports are contained in UN Doc. CRC/C/58 (1996), entitled "General guidelines regarding the form and content of periodic reports to be submitted by States parties under article 44, para. 1(b), of the Convention".

[102] Rule 68 Provisional Rules of Procedure.

[103] Art. 45(d) CRC states that the ComRC may make suggestions and general recommendations based on information received. These are to be transmitted to any state party concerned and reported to the General Assembly, together with comments, if any, from states parties. See also Rule 71 Provisional Rules of Procedure. Rule 72 provides for "other general recommendations".

[104] Rule 67 Provisional Rules of Procedure.

[105] Art. 44(4) CRC. See also Rule 69 Provisional Rules of Procedure.

should further be noted that the Committee has developed an urgent action procedure at its second session.[106] Provided that a case relates to rights under the Convention, that it has occurred under the jurisdiction of a state party and that it pertains to a situation which is serious, *i.e.* which involves a risk of further violations, the Committee may take up the matter with the state party concerned "in a spirit of dialogue". The Committee may do so *ex officio*, or where the matter has been brought to its attention by UN or other competent bodies. A report or additional information may be requested from the state party concerned, or a visit to the state party may be suggested.

The supervisory system of the CRC also involves the UN Specialised Agencies, UNICEF and other UN organs. Article 45(a) CRC grants to these bodies the right to be represented at the consideration of the implementation of the CRC. The Committee may further invite them to provide expert advice, or to submit reports on the implementation of the CRC. The Committee must, under article 45(b), transmit to the bodies concerned the reports from states parties that contain a request or indicate a need for technical assistance. NGOs also play an important role in the supervision of the CRC. They may submit written information and be invited to participate in the work of the Pre-Sessional Working Group.

The ComRC may recommend to the General Assembly to request the Secretary-General to undertake on its behalf studies on specific issues relating to children's rights.[107] Like the CESCR, the ComRC also holds General Discussion Days[108] and issues General Comments.[109] Of the General Discussion Days held so far,[110] seven were relevant to the right to education, namely, the general discussions on the economic exploitation of children (Fourth Session, 1993),[111] on the girl child (Eighth Session, 1995),[112] on the rights of children with disabilities (Sixteenth Session, 1997),[113] on violence against children within the family and in schools (Twenty-Eighth Session, 2001),[114] on the private sector as service provider and its role in implementing child

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[106] See UN Doc. A/49/41 (1994), paras. 372–381.

[107] Art. 45(c) CRC. See also Rule 76 Provisional Rules of Procedure.

[108] Rule 75 Provisional Rules of Procedure.

[109] Rule 73 Provisional Rules of Procedure.

[110] As at the end of 2004, the ComRC has held fourteen General Discussion Days. On the first ten General Discussion Days, see the document, entitled "Committee on the Rights of the Child: Reports of General Discussion Days", which the UNHCHR has compiled.

[111] See UN Doc. CRC/C/24, para. 177(b), Recommendation 6(b)(ii) and (c)(ii) third aspect.

[112] See UN Doc. CRC/C/38, Annex V, Part A, para. 3(a).

[113] See UN Doc. CRC/C/69, Recommendations at para. 338(d)(ii) and (iii), (h), and (k)(ii) and (iii).

[114] See UN Doc. CRC/C/111, paras. 674–745.

rights (Thirty-First Session, 2002),[115] on the rights of indigenous children (Thirty-Fourth Session, 2003),[116] and on implementing child rights in early childhood (Thirty-Seventh Session, 2004).[117] As at the end of 2004, the Committee has issued five General Comments. General Comment No. 1, adopted in 2001, during its twenty-sixth session, deals with the aims of education, stipulated in article 29(1) CRC.[118] The General Comment constituted the Committee's formal contribution to the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, held at Durban, South Africa from 31 August to 8 September 2001. The Committee, in the General Comment, sets out to discuss the significance of article 29(1). It goes on to elaborate on the six functions of article 29(1). Next, the Committee comments on human rights education. Finally, it addresses the implementation, monitoring and review of article 29(1). General Comment No. 1 will be referred to below when discussing article 13(1) second and third sentence ICESCR on the aims of education.[119] But, also certain other General Comments of the Committee contain observations relevant to the right to education. General Comment No. 3 on HIV/AIDS and the rights of the child thus addresses HIV/AIDS *inter alia* in the light of the requirements of the child's right to education.[120] General Comment No. 4 on adolescent health and development in the context of the CRC deals, amongst others, with the right to education of adolescents.[121]

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[115] See UN Doc. CRC/C/121, para. 653, Legal Obligations and Recommendations 4 and 23.

[116] See UN Doc. CRC/C/133, para. 624, Recommendations 9 and 19.

[117] See Recommendations 2, 4, 8, 11, 13 and 14.

[118] ComRC, General Comment No. 1 (Twenty-Sixth Session, 2001) [UN Doc. CRC/C/103] The aims of education (art. 29(1) CRC) [*Compilation*, 2004, pp. 294–301]. The full text of the General Comment is included in the Annex to this book.

[119] See 10.3. *infra.*

[120] ComRC, General Comment No. 3 (Thirty-Second Session, 2003) HIV/AIDS and the rights of the child [*Compilation*, 2004, pp. 308–321], paras. 6, 16, 17, 18 and 19.

[121] ComRC, General Comment No. 4 (Thirty-Third Session, 2003) Adolescent health and development in the context of the Convention on the Rights of the Child [*Compilation*, 2004, pp. 321–332], paras. 17, 19, 20 and 31.

CHAPTER NINE

THE GENERAL PROVISIONS OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

1. *Introduction*

Bruno Simma has remarked that the ICESCR "[i]n spite of [its] impressive record . . . shares the chronic weakness apparently befalling all international instruments for the protection of economic, social and cultural rights: It is not taken seriously, one way or another".[1] He argues that there are particularly two ways in which the ICESCR is not taken seriously.[2] On the one hand, there is the nonchalant, minimalist or bureaucratic attitude towards the ICESCR. It entails softening the substantive obligations and the implementation procedure of the ICESCR, by downgrading the Covenant's significance, be it, initially, in the act of "selling" the Covenant to the legislature or, subsequently, in its day-to-day interpretation and application. It is accomplished by propagating that the ICESCR does not really change anything. On the other hand, there is the pseudo-maximalist approach "attempting to distort the nature of the treaty obligations beyond meaningful proportions into something threatening or absurd".[3] The assertion is that the ICESCR brings with it enormous and incalculable commitments. Neither approach is correct. Simma's observations make it clear that an effort needs to be made to describe the nature and scope of obligations imposed by the ICESCR in a truthful manner. It needs to be shown that the ICESCR imposes clear legal obligations, but that, at the same time, it does not require states parties to make available more resources for the realisation of ESCR than they can reasonably afford in the circumstances.

It is important to do so within the context of this book, as the right to education is one of the rights protected by the ICESCR. It should be shown that it is not sufficient for states parties to the ICESCR to merely take note in passing of article 13 ICESCR and, in the end, "to leave things as they are". It should, however, also be shown that article 13 does not

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[1] Simma, 1991, p. 75.
[2] See *ibidem* at pp. 75–79.
[3] *Ibidem* at p. 78.

create rights to benefit from the educational services of a full-fledged welfare state, however poor the society.

The present Chapter will examine articles 2(1), 2(2) and 4 ICESCR. Article 2(1) is the linchpin of the ICESCR. It describes the general nature of state obligations in the realisation of Covenant rights. It provides for the progressive realisation of ESCR. Article 2(2) is a non-discrimination provision. It prohibits discrimination on specified grounds in the exercise of the rights protected under the Covenant. Article 4 is a general limitation provision. It sanctions, but simultaneously restricts, limitations of rights of the Covenant. Whereas the rights provisions of the Covenant are contained in Part III ICESCR, articles 2(1), 2(2) and 4 appear in Part II ICESCR. As it were, the broad provisions of Part II must inform the interpretation and application of the rights provisions of Part III.

2. *Article 2(1) ICESCR: The Progressive Realisation of Covenant Rights*

It is important to properly understand the nature and scope of obligations imposed by the ICESCR. Essentially this requires an examination of article 2(1) ICESCR, which provides as follows:

> Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

In what follows, article 2(1) ICESCR will be examined.[4] First of all, it will be examined whether, in the light of the notion of progressiveness in article 2(1), the ICESCR is, in fact, a legally binding instrument. Next, the various elements of article 2(1) will be analysed one by one. Lastly, a few words will be said on the value of article 2(1) in times of economic hardship. Whenever appropriate, the discussion will be related to article 13 ICESCR.

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[4] The equivalent provision in the CRC is art. 4 of that Convention. Art. 4 states, "States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation". What is said on art. 2(1) ICESCR in the discussion below, applies *mutatis mutandis* to art. 4 CRC. See also ComRC, General Comment No. 5 (Thirty-Fourth Session, 2003) General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44(6) CRC) [*Compilation*, 2004, pp. 332–353].

The discussion will frequently refer to *General Comment No. 3*,[5] mentioned above,[6] of the Committee on Economic, Social and Cultural Rights (CESCR). General Comment No. 3 elaborates on article 2(1) ICESCR. It describes the general nature of states parties' obligations under the Covenant, as understood by the CESCR. The discussion will further often refer to the *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*.[7] The Limburg Principles are the outcome of a meeting of experts in international law, held at Maastricht, the Netherlands from 2 to 6 June 1986, to consider the nature and scope of the obligations of states parties to the ICESCR, the consideration of states parties' reports by the CESCR and international co-operation under Part IV of the ICESCR.[8] It has been stated of the Limburg Principles that they constitute "a contribution to improving comprehension of economic, social and cultural rights, as contained in the Covenant, and the obligations accompanying these rights", and that they should be seen as an authoritative interpretation of Covenant provisions.[9] Moreover, the CESCR's General Comment No. 13 on article 13 ICESCR,[10] mentioned above,[11] will be referred to, whenever appropriate.

2.1. *Article 2(1) ICESCR and the Covenant's Legally Binding Nature*

Article 2(1) ICESCR obliges states parties to achieve *progressively* the full realisation of the rights recognised in the Covenant. The notion of progressiveness in article 2(1) has caused various writers to dispute the legally binding nature of the ICESCR.[12] These writers base their view in partic-

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[5] CESCR, General Comment No. 3 (Fifth Session, 1990) [UN Doc. E/1991/23] The nature of States parties' obligations (art. 2(1) ICESCR) [*Compilation*, 2004, pp. 15–18].

[6] See 8.5.2. *supra*.

[7] The Limburg Principles have been published in the *Human Rights Quarterly*, Vol. 9, 1987, pp. 122–135. Comments on the Limburg Principles have been made by Dankwa and Flinterman, 1988, pp. 275–281.

[8] The meeting of experts was convened by the International Commission of Jurists (Geneva, Switzerland), the Centre for Human Rights of the Faculty of Law of the University of Limburg (Maastricht, the Netherlands) and the Urban Morgan Institute for Human Rights, University of Cincinnati (Cincinnati, Ohio, USA). The Limburg Principles have been circulated as an official UN document (UN Doc. E/CN.4/1987/17).

[9] See Arambulo, 1999, pp. 161–162. See also Martin, 1998, pp. 191–205, who states that a survey of academic literature and UN documents in the ten years subsequent to the adoption of the Limburg Principles shows that they represent a step towards improving implementation of ESCR. He provides a list of academic writings in which the Limburg Principles have been cited.

[10] CESCR, General Comment No. 13 (Twenty-First Session, 1999) [UN Doc. E/2000/22] The right to education (art. 13 ICESCR) [*Compilation*, 2004, pp. 71–86]. The full text of the General Comment is included in the Annex to this book.

[11] See 8.5.2. *supra*.

[12] See, for example, Vierdag, 1978, pp. 96–105 and the discussion of his views at 3.3.3. *supra*.

ular on the fact that article 2(2) ICCPR, the equivalent of article 2(1) ICESCR in the former Covenant, requires the immediate fulfilment of guarantees. Article 2(2) ICCPR provides:

> Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognised in the present Covenant.

The provision expects of states that where, on becoming party to the ICCPR, legislation or other measures safeguarding CPR have not already been adopted, they will be adopted *without delay*.[13] States parties are not allowed a period of adjustment.[14] In the said writers' mind, the fact that the ICESCR does grant such a period of adjustment, is seen to confirm its nature as a "promotional convention" of a predominantly political character. The Covenant's rights provisions are perceived to merely reflect "programme rights".

In this writer's view, it is not correct to read the ICESCR as not imposing obligations of a legal nature. By virtue of article 26 of the Vienna Convention on the Law of Treaties it must be accepted that treaties are binding upon the parties to them and must be performed by them in good faith. The *travaux préparatoires* of article 2(1) bear out that "supporters of the idea of progressive achievement viewed it not as an escape hatch for states whose performance failed to match their abilities or as a lessening of state obligations. It was viewed and defended simply as a necessary accommodation to the vagaries of economic circumstances".[15] It should further be pointed out that a rendering of the ICESCR as not being legally binding, fails to distinguish between what has been termed "obligations of conduct" and "obligations of result". "Obligations of conduct" expect states to undertake a specific course of conduct (immediately). Against that, "obligations of result" expect states to achieve a particular result (at some point in the future). They are required to do so, through a course of conduct, the nature of and the means required for which are left to state discretion.[16]

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[13] The notion of immediacy is also reflected by art. 2(1) ICCPR, which states, "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

[14] As has been indicated at 3.3.2. *supra*, the argument that CPR must be implemented immediately whilst ESCR can only be implemented progressively is, strictly speaking, not correct. Also CPR can often only be implemented progressively.

[15] Alston and Quinn, 1987, p. 175. The authors provide an account of the *travaux préparatoires* of art. 2(1) on the point at pp. 173–175.

[16] The distinction between "obligations of conduct" and "obligations of result" has its

Whereas the ICCPR generally imposes "obligations of conduct", the ICESCR generally imposes "obligations of result". It needs to be appreciated that not only "obligations of conduct", but also "obligations of result" constitute *legal* obligations. The fact that the latter may grant the state a period of time within which to achieve the envisaged result, does not mean that they are devoid of legal quality. On the contrary, there is a legal duty for states to take immediate steps aimed at achieving the result.[17] Regarding the ICESCR, states, on becoming party to the Covenant, are called upon, right away, to devise programmes directed at the realisation of the rights of the Covenant and to proceed with their implementation.[18] Any failure on the part of states parties to take such steps amounts to a violation of duties under international law.

These considerations apply with equal force to article 13 ICESCR read with article 2(1) ICESCR. Article 13 ICESCR imposes legal obligations on states parties. Manfred Nowak has remarked in this regard that the right to education "is not only a kind of idealistic goal . . . but a legally binding human right . . . [a] human right with corresponding obligations of States under international law".[19] From the very moment a state becomes party to the ICESCR, it must embark upon formulating a national educational policy and take measures designed to implement that policy. A state which fails to do so, violates article 13 read with article 2(1).[20]

2.2. *The Various Elements of Article 2(1) ICESCR*

In the following discussion, the various elements of article 2(1) ICESCR will be analysed.

2.2.1. *"Undertakes to Take Steps"*

Article 2(1) requires states parties "to take steps".[21] The phrase reflects the view of some of the drafters of the ICESCR that each rights provision

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origin in the work of the International Law Commission. See the Report of the International Law Commission in the *Yearbook of the International Law Commission*, Vol. 2, Part 2, 1977, pp. 11–30.

[17] In a sense, these immediate steps may be seen as "obligations of conduct". Matthew Craven, 1995, p. 107 holds that "to conceive of the [ICESCR] as merely imposing obligations of result is to deprive it of any serious content". He argues that art. 2(1) ICESCR should be read as incorporating both "obligations of conduct" and "obligations of result". See Craven, 1995, pp. 107–109.

[18] See Simma, 1989, p. 196.

[19] Nowak, 1991, p. 425.

[20] See in this regard the discussion of violations of the right to education at 12.3.2.3. *infra*, particularly at 12.3.2.3.2.1. and 12.3.2.3.2.2.

[21] For comments on this requirement, see Alston and Quinn, 1987, pp. 165–166 and Craven, 1995, pp. 114–115.

should spell out in detail the specific steps to be taken by states parties in order to implement a particular right. A reading of the Covenant shows, however, that this idea has not been carried through in a consistent manner. Whereas article 11 contains a long list of steps relevant to the right to be free from hunger, article 9 on the right to social security mentions no steps whatsoever.[22] The duty to take steps must, therefore, be understood as a duty to take not only those steps stipulated in the ICESCR, but also additional steps. This is of importance when considering article 13. Paragraphs (1) to (4) of article 13 mention various steps aimed at realising the right to education. Even so, the duty of states parties in article 13(1) to "recognise the right of everyone to education" expects them to take steps over and above those set out in the said paragraphs of article 13.

The duty to take steps is of an immediate character. The CESCR states in its General Comment No. 3 that

> while the full realisation of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force for the States concerned.[23]

Furthermore,

> [s]uch steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognised in the Covenant.[24]

General Comment No. 13 repeats these considerations for the right to education in article 13 ICESCR. It states:

> States parties have immediate obligations in relation to the right to education, such as . . . the obligation "to take steps" (article 2(1)) towards the full realisation of article 13. Such steps must be "deliberate, concrete and targeted" towards the full realisation of the right to education.[25]

2.2.2. *"Individually and Through International Assistance and Co-operation, Especially Economic and Technical"*

Article 2(1) further requires states parties to realise the rights of the Covenant "individually and through international assistance and co-operation, espe-

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[22] See Alston and Quinn, 1987, p. 165.

[23] General Comment No. 3, see note 5, para. 2. See also para. 16 Limburg Principles, see note 7, which states, "All States parties have an obligation to begin immediately to take steps towards full realisation of the rights contained in the Covenant".

[24] General Comment No. 3, see note 5, para. 2.

[25] General Comment No. 13, see note 10, para. 43. See also para. 52 General Comment No. 13, which refers to "an immediate obligation" of states parties "to take steps" towards the realisation of secondary, higher and fundamental education (art. 13(2)(b)–(d) ICESCR).

cially economic and technical".[26] Thus, states parties need not realise Covenant rights all on their own, but may also rely on international assistance and co-operation. They are obliged to do so, where the rights of the Covenant cannot be realised without such assistance and co-operation.

The question is, of course, who must render the envisaged international assistance and co-operation. A joint reading of articles 22 and 23 ICESCR[27] points primarily to the various organs of the UN, their subsidiary organs and the Specialised Agencies concerned with furnishing technical assistance, as those responsible in this regard.[28] But, also states parties are called upon to contribute to the fulfilment of ESCR in other states parties.[29] The CESCR has made the following comment:

> The Committee wishes to emphasise that in accordance with Articles 55 and 56 of the Charter of the United Nations, with well-established principles of international law, and with the provisions of the Covenant itself, international co-operation for development and thus for the realisation of economic, social and cultural rights is an obligation of all States. It is particularly incumbent upon those States which are in a position to assist others in this regard.[30]

To support its view, the Committee refers in particular to articles 55 and 56 UN Charter. Article 55 specifies under (a) as one of the purposes of the UN the promotion of "higher standards of living, full employment and conditions of economic and social progress and development". Article 56 goes on to state that, "[a]ll Members pledge themselves to take joint and separate action in co-operation with the Organisation for the achievement of the purposes set forth in Article 55".[31] It is not altogether clear though,

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[26] For comments on this requirement, see Alston and Quinn, 1987, pp. 186–192 and Craven, 1995, pp. 144–150. In the present context, see also the discussion of the right to education and external state obligations at 12.2.3. *infra*.

[27] Arts. 22 and 23 ICESCR have been referred to at 6.2.1.2. *supra*, in the context of the discussion of UNESCO's role in the implementation of the ICESCR. Art. 23 ICESCR mentions technical assistance as one of the forms of international action for the achievement of the rights of the Covenant. Art. 22 ICESCR seeks to ensure that the various organs of the UN, their subsidiary organs and the Specialised Agencies concerned with furnishing technical assistance obtain possession of the necessary information, to enable them to decide on the advisability of furnishing technical assistance.

[28] The duty of these bodies to render international assistance and co-operation has been referred to in the final paragraph of 8.4.3. *supra*.

[29] Para. 34 Limburg Principles, see note 7, refers additionally to the role of NGOs in undertaking international assistance and co-operation.

[30] General Comment No. 3, see note 5, para. 14. The CESCR notes the importance of the principles recognised in the Declaration on the Right to Development, adopted by UNGA Resolution 41/128 of 4 December 1986, in this connection.

[31] Note should also be taken of para. 34 of the Vienna Declaration, adopted by the World Conference on Human Rights, held at Vienna, Austria from 14–25 June 1993. Para. 34 states that "[i]ncreased efforts should be made to assist countries which so request to create the conditions whereby each individual can enjoy universal human rights and fundamental freedoms". Governments, the UN system and multilateral organisations "are urged to increase considerably the resources" allocated to this end.

whether the obligation of states parties to assist and to co-operate with other states parties is of a legal nature. The detailed legal implications of articles 55 and 56 UN Charter are notoriously imprecise.[32] It is also difficult to conclude from the *travaux préparatoires* of the ICESCR that states parties incur a legally binding obligation in this regard.[33] Alston and Quinn are of the opinion, however, that "[i]n the context of a given right it may, according to the circumstances, be possible to identify obligations to co-operate internationally that would appear to be mandatory on the basis of the undertaking contained in Article 2(1) of the Covenant".[34] The matter remains contentious.[35]

The phrase "individually and through international assistance and co-operation, especially economic and technical" is also commented on by the Limburg Principles.[36] Paragraph 29 Limburg Principles states that international co-operation and assistance pursuant to the UN Charter and the ICESCR must accord priority to the realisation of human rights, whether CPR or ESCR. Paragraph 30 states further that "[i]nternational co-operation and assistance must be directed towards the establishment of a social and international order in which the rights and freedoms set forth in the Covenant can be fully realised". States parties are expected to co-operate with each other, irrespective of differences in their political, economic and social systems. They must co-operate, in particular, to promote the economic growth of developing countries.[37] States parties are required to "take steps by international means".[38] An indication of the international action envisaged by article 2(1) is provided by article 23 ICESCR. Article 23 refers to the conclusion of conventions, the adoption of recommendations, the furnishing of technical assistance and the holding of regional meetings and technical meetings for the purpose of consultation and study.[39]

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[32] See Alston and Quinn, 1987, pp. 187–188.

[33] See *ibidem* at p. 191.

[34] *Idem.*

[35] The view of Alston and Quinn is plausible. A purposeful interpretation of the ICESCR requires that the obligation of states parties to assist and to co-operate with other states parties be viewed as legally binding, at least, in certain instances. Ultimately, as the CESCR has stated in para. 14 General Comment No. 3, see note 5, "[I]n the absence of an active programme of international assistance and co-operation on the part of all those States that are in a position to undertake one, the full realisation of economic, social and cultural rights will remain an unfulfilled aspiration in many countries".

[36] Limburg Principles, see note 7.

[37] *Ibidem* at para. 31.

[38] *Ibidem* at para. 32.

[39] Note should further be taken of para. 33 Limburg Principles, see note 7, which emphasises that international co-operation and assistance must be based on the sovereign equality of states.

General Comment No. 13, in paragraph 56, spells out the importance of international assistance and co-operation regarding the right to education. Amongst others, paragraph 56 refers to article 10 of the (non-binding) World Declaration on Education for All, adopted by the World Conference on Education for All, held at Jomtien, Thailand from 5 to 9 March 1990. Article 10(1) points to the need for international solidarity in the field of education. The world community, including intergovernmental bodies, is stated, in article 10(2), to have "an urgent responsibility" to alleviate the constraints that prevent some countries from achieving education for all. Mention is made of measures that augment the national budgets of the poorest countries or serve to relieve heavy debt burdens. Article 10(3) stresses that least developed and low-income countries have special needs which require priority in international support for basic education needs. Finally, it is emphasised, in article 10(4), that individuals can only benefit from education if a stable and peaceful environment exists. This highlights the duty of states to work together to resolve conflicts and strife. This also constitutes international assistance and co-operation within the meaning of article 2(1)![40]

What international assistance and co-operation regarding the right to education may entail, may be gleaned from the legal instruments on education adopted by UNESCO. It may entail:

- the conclusion of bilateral or multilateral international agreements: to create uniform international educational standards,[41] to provide for the mutual recognition of studies, diplomas and degrees[42] or to arrange for the reciprocal study and revision of textbooks to ensure that they enhance mutual knowledge and understanding between different peoples;[43]
- the exchange of information in the field of education, for example, publications on topics of educational relevance, information concerning curriculum development, methods and materials, teaching materials and

[40] Para. 56 General Comment No. 13, see note 10, also points out that when negotiating and ratifying international agreements, states parties must ensure that these instruments do not adversely impact upon the right to education, and further that they must ensure that their actions as members of international organisations take due account of the right to education.

[41] Fig. X, sect. 99 Revised Recommendation concerning Technical and Vocational Education, art. 6(b) Convention on Technical and Vocational Education, fig. X, sect. 63 Recommendation on the Development of Adult Education.

[42] Art. 6(c) Convention on Technical and Vocational Education.

[43] Fig. X, sect. 45 Recommendation concerning Education for International Understanding, Co-operation and Peace and Education relating to Human Rights and Fundamental Freedoms.

mass media programmes of a pedagogical character,[44] or information concerning innovations, ideas and experience in education;[45]
- the exchange of human resources in the field of education, *i.e.* students, teachers, administrators and educational specialists;[46]
- the holding of periodic meetings at the ministerial level,[47] international meetings and study sessions[48] and regional or subregional meetings,[49] to discuss problems in the educational field common to many states and to find solutions thereto;
- the provision of technical assistance and material or financial assistance to states, intended to be of use to them in developing their education systems;[50] or
- the creation of joint facilities for higher level research and the establishment of sustained co-operation between similar institutions in different countries.[51]

2.2.3. *"To the Maximum of Its Available Resources"*

In the implementation of ESCR, article 2(1) obliges states parties to take steps "to the maximum of [their] available resources".[52] "Resources" may be defined as "that upon which the satisfaction of the [Covenant's] rights is dependent".[53] Robert Robertson identifies the following types of resources: money, natural resources, human resources, technology and information.[54] Money is of special importance in the realisation of the right to education. Clearly, without adequate financing the right cannot be guaranteed. But, also human resources are needed to fulfil the right to education.[55]

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[44] Fig. X, sect. 95 Revised Recommendation concerning Technical and Vocational Education.

[45] Art. 6(a) Convention on Technical and Vocational Education.

[46] Fig. X, sect. 98(a) Revised Recommendation concerning Technical and Vocational Education, art. 6(d) Convention on Technical and Vocational Education, fig. X, sect. 43 Recommendation concerning Education for International Understanding, Co-operation and Peace and Education relating to Human Rights and Fundamental Freedoms.

[47] Fig. X, sect. 96(a) Revised Recommendation concerning Technical and Vocational Education.

[48] Fig. X, sect. 43 Recommendation concerning Education for International Understanding, Co-operation and Peace and Education relating to Human Rights and Fundamental Freedoms.

[49] Fig. X, sect. 63 Recommendation on the Development of Adult Education.

[50] Fig. X, sect. 62 Recommendation on the Development of Adult Education.

[51] Fig. X, sects. 96(b) and 98(b) Revised Recommendation concerning Technical and Vocational Education.

[52] For comments on this requirement, see Alston and Quinn, 1987, pp. 177–181, Robertson, 1994, pp. 693–714 and Craven, 1995, pp. 136–144.

[53] Robertson, 1994, p. 695.

[54] See *ibidem* at pp. 695–697.

[55] See, for example, art. 5 Declaration on Social Progress and Development, adopted

This means teachers, administrators and educational specialists. Similar significance must be attached to information as a type of resource. Scientific studies, for example, may contribute to highlighting the causes of difficulties which impede the implementation of the right to education. Another example is that of information campaigns to inform the public about their right to education under the Covenant. The distribution of information is an inexpensive but highly effective way of promoting the right to education.

The question arises as to which resources are potentially "available". The accepted view is that this refers not solely to a government's planned expenditures.[56] "It must be made clear that the reference [to resources] was to the real resources of the country and not to budgetary appropriations".[57] Paragraph 26 Limburg Principles further states:

> "Its available resources" refers to both the resources within a State and those available from the international community through international co-operation and assistance.[58]

Danilo Türk, a former Special Rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities on Economic, Social and Cultural Rights, has, in his reports, argued for a wide interpretation of resource availability. He doubts that states are capable of fulfilling ESCR all on their own. In his view, states should recognise their own inadequacies in this regard, and should let flourish "[p]eople's movements, campaigns and initiatives aimed at satisfying citizens' needs . . . as perhaps one of the few means by which people who are organised can express themselves and create solutions for their many predicaments".[59] Türk considers it important that states allow the use of private resources. States should not deny citizens the ability of satisfying their own needs.[60] On this account, state responsibility may properly be said to extend beyond the resources over which the state exercises direct control.[61] In the educational context, this means, most notably, that states should not frustrate

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by UNGA Resolution 2542 (XXIV) of 11 December 1969, which states, "Social progress and development require the full utilisation of human resources".

[56] See Robertson, 1994, p. 698.

[57] Statement made by Mr. Azkoul, Lebanon, in the course of the drafting of the ICESCR. See UN Doc. E/CN.4/SR.271, p. 5.

[58] See also General Comment No. 3, see note 5, para. 13.

[59] Türk, D., *The Realisation of Economic, Social and Cultural Rights*, UN Doc. E/CN.4/Sub.2/1992/16, para. 192 (Final Report submitted by the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on Economic, Social and Cultural Rights).

[60] See *idem*.

[61] See Robertson, 1994, pp. 698–699. Para. 24 Limburg Principle, see note 7, states in this regard, "Progressive implementation can be effected not only by increasing resources, but also by the development of societal resources necessary for the realisation by everyone of the rights recognised in the Covenant".

the efforts of individuals and bodies to establish and maintain private schools. The authorities should not demand compliance with excessive educational or administrative requirements. Instead, the existence of a system of private schools should be promoted.

Next, the question arises as to what it means to use the "maximum" resources available. Here a distinction should be drawn between satisfying a right's core entitlements, on the one hand, and satisfying all the entitlements a right entails, on the other.

Regarding the former case, paragraph 10 General Comment No. 3 should be referred to.[62] There the CESCR expresses its view that "a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party".[63] As regards the right to education, this means "the most basic forms of education".[64] A failure to ensure core entitlements amounts to "*prima facie* failing to discharge [. . .] obligations under the Covenant". Any such failure, in effect, gives rise to a presumption of guilt, which a state party will have to rebut. General Comment No. 3 goes on to state:

> [I]t must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. Article 2(1) obligates each State party to take the necessary steps "to the maximum of its available resources". In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that *every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations*.[65]

In other words, a state party will only escape liability if it can show that it has utilised all resources available to fulfil the core entitlements of ESCR, and that it has given priority to the fulfilment of the stated core entitlements.[66]

Regarding the latter case, that of satisfying all the entitlements a right entails, states parties have a wide discretion to determine which resources to apply and what to regard as amounting to "maximum" resources. Their discretion is not open-ended, though.[67] Alston and Quinn hold that states

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[62] General Comment No. 3, see note 5.

[63] See also para. 25 Limburg Principles, see note 7, which states, "States parties are obligated, regardless of the level of economic development, to ensure respect for minimum subsistence rights for all".

[64] At 12.3.2.3.2.1. *infra*, it will be indicated which aspects of the right to education may be considered to form part of the core content of the right to education.

[65] Author's italics.

[66] See also para. 28 Limburg Principles, see note 7, which states, "In the use of the available resources due priority shall be given to the realisation of rights recognised in the Covenant, mindful of the need to assure to everyone the satisfaction of subsistence requirements as well as the provision of essential services".

[67] See Alston and Quinn, 1987, p. 177.

parties should be required to comply with a process requirement. They should be required to demonstrate the conduct of a principled policy-making process, "one reflecting a sense of the importance of the relevant rights".[68] The CESCR cannot substitute its judgement for that of a state party as regards resource allocations the state party has made. But, the Committee *can* judge whether a state party's policy-making process shows awareness and respect for the right to education and other ESCR and for the requirement that "maximum" resources must be used to realise these rights.[69]

It is further important to take special note of paragraph 27 Limburg Principles. Paragraph 27 states:

> In determining whether adequate measures have been taken for the realisation of the rights recognised in the Covenant attention shall be paid to equitable and effective use of and access to the available resources.[70]

The point made by paragraph 27 is not trite. It has been stated with regard to the right to education that "educational success . . . depends only very secondarily on financial resources".[71] A study has been conducted in Switzerland, where the massive injection of money into an education system proved useless, except to show that problems thought to be soluble "by having money thrown at them" were, in practice, of quite another dimension: It is not sufficient to increase the resources of the education system in order to combat failure and inequality effectively. It is the use of resources and the way they are put to work that must be questioned.[72] Thus, questioning the use of resources should be regarded a part of the CESCR's task in supervising the ICESCR.

The final question relates to how to measure state compliance. Robert Robertson makes the interesting suggestion that state performance should be assessed by measuring it against standards of resource utilisation indicative of compliance.[73] With regard to financial resources, for example, he considers both comparisons between different countries and comparisons between a state party's expenditures on ESCR (the right to education) and its expenditures on other items reasonable. If states parties, which are similarly developed and which have comparable economies, spend significantly

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[68] *Ibidem* at pp. 180–181.

[69] See Robertson, 1994, p. 702.

[70] Para. 23 Limburg Principles, see note 7, is to the same effect and refers to the "effective use of resources available".

[71] Fernandez and Nordmann, 1998, para. 25 (UN Doc. E/C.12/1998/14).

[72] See Hutmacher, W., *Quand la réalité résiste à la lutte contre l'échec scolaire*, DIP, Geneva, 1993, pp. 147–148.

[73] See Robertson, 1994, p. 703. Generally, on the question of how to measure state compliance, see *ibidem* at pp. 703–713.

different amounts on ESCR (the right to education), this is indicative, in the case of the low-spender, of non-compliance. Likewise, where a state party spends high amounts on its military compared to insignificant sums on ESCR (the right to education), this also points to non-compliance.[74]

2.2.4. *"With a View to Achieving Progressively the Full Realisation of the Rights Recognised in the Present Covenant"*

Article 2(1) obliges states parties to realise the rights of the Covenant "progressively".[75] The reason why article 2(1) speaks of "progressive realisation" is that the drafters of the ICESCR appreciated that realising ESCR depends on resources, which, more often than not, are scarce, as a result of which the realisation of ESCR may take time.[76] The notion of "progressive realisation" in article 2(1) ICESCR is often contrasted with the notion of immediacy in the ICCPR. Article 2(1) ICCPR uncompromisingly provides that states parties must "respect" and "ensure" the rights of the Covenant and article 2(2) that they must take the necessary steps "to give effect" to them. The notion of immediacy in the ICCPR is premised on the assumption that realising CPR does not depend on resources and can, therefore, take place immediately. The differences between the two Covenants should not be overstated, however. Also CPR often depend on resources and cannot be guaranteed immediately. Consequently, the better view is to consider the same standard to be applicable to both the ICESCR and the ICCPR. Both Covenants must be implemented "at the earliest possible moment".[77]

The CESCR has described the idea of "progressive realisation" as "a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realisation of economic, social and cultural rights".[78] At the same time, however, it emphasises that sight must not be lost of the fact that the ICESCR's objective is to establish clear obligations.[79] The Covenant is thus observed to create the obligation "to move as expeditiously and effectively as possible" towards the goal of full realisation of Covenant rights.[80] The Committee has repeated its view with regard to article 13 ICESCR, and has commented:

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[74] See *ibidem* at pp. 709–713.

[75] For comments on this requirement, see Alston and Quinn, 1987, pp. 172–177 and Craven, 1995, pp. 129–134.

[76] Craven, 1995, pp. 132–134 raises the question whether the rights of the ICESCR must be realised immediately where the required resources are available. At p. 133, he notes that the CESCR "has not taken the view that developed States should be bound to implement the obligations immediately".

[77] See *ibidem* at p. 130.

[78] General Comment No. 3, see note 5, para. 9.

[79] *Idem.*

[80] *Idem.* Para. 21 Limburg Principles, see note 7, expresses the same idea. It states, "The

> Progressive realisation means that states parties have a specific and continuing obligation "to move as expeditiously and effectively as possible" towards the full realisation of the right to education.[81]

The concept of "progressive realisation" *e contrario* excludes retrogressive measures.[82] For this reason, the CESCR has held that deliberately retrogressive measures must be carefully considered. Where they are taken, they must be justified by reference to the totality of Covenant rights or in the context of the full use of the maximum available resources.[83] The Committee has reiterated this with regard to article 13 ICESCR:

> There is a strong presumption of impermissibility of any retrogressive measures taken in relation to the right to education . . . If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the State party's maximum available resources.[84]

It is in this sense that the practice of many states parties these days, of introducing or increasing study fees at the secondary or tertiary level of education, must be seen to constitute a *prima facie* violation of the right to education.[85] Ultimately, article 13(2)(b) and (c) ICESCR envisage "the progressive introduction of free education" at these levels. States parties can only exculpate themselves, either by demonstrating that they are suffering an economic crisis such that, even by utilising the maximum available resources, the introduction or increase is inevitable, or by showing that the measure is taken for the purpose of improving the situation with regard to the totality of Covenant rights. The latter defence appears to legitimise "trade-offs" between and within rights. It might thus be open for a state party to lower the enjoyment of a right or an aspect thereof, if, at the same time, it substantially raises the enjoyment of another or an aspect of

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obligation 'to achieve progressively the full realisation of the rights' requires States parties to move as expeditiously as possible towards the realisation of the rights. Under no circumstances shall this be interpreted as implying for States the right to defer indefinitely efforts to ensure full realisation. On the contrary all States parties have the obligation to begin immediately to take steps to fulfil their obligations under the Covenant".

[81] General Comment No. 13, see note 10, para. 44.

[82] The topic of deliberately retrogressive measures is also dealt with at 9.2.2.5.2., 9.4. and 12.3.2.3.2.5. *infra.*

[83] General Comment No. 3, see note 5, para. 9. See also Craven, 1995, p. 132.

[84] General Comment No. 13, see note 10, para. 45.

[85] Granted, the CESCR does not speak of *prima facie* violations in the context of retrogressive measures. See Craven, 1995, pp. 131–132. This should be explained, however, against the Committee's expressed desire to enter into a "constructive dialogue" with states parties in the reporting process. The use of the language of violations might, in the Committee's view, frustrate a "constructive dialogue".

the same right.[86] In this writer's view, this potentially covers the case where the introduction or increase of study fees, which impairs access to education, simultaneously, significantly improves the quality of education. This presupposes that the study fees collected remain with the educational institution concerned and do not flow into the public purse. The matter remains highly contentious, however.[87] As part of proving either of the two defences recognised by the CESCR, states parties should additionally have to show that programmes have been or will be adopted to protect vulnerable members of society, notably students from families which earn a low income.[88] *In casu*, these could take the form of arrangements in terms of which such students are exempted from paying study fees, alternatively of study bursary or low-interest credit facility schemes benefiting impecunious students. Nevertheless, where a state party succeeds in justifying the introduction or increase of study fees, this must not be interpreted as a licence not to move progressively towards free secondary and tertiary education. The language of article 13(2)(b) and (c) is all too clear in this regard. If the international community considers progressively free secondary and tertiary education to be based on outdated views of the prospective development of the world economy, the only (rather doubtful) way out is to have article 13(2)(b) and (c) amended!

Generally on retrogressive measures in the educational context, it has correctly been remarked as follows by Pius Gebert in an academic article:

> Decisive is that the principle of the progressive realisation of the ICESCR as a matter of principle forbids cutbacks of standards achieved in the education system. Reversing social, economic and cultural achievements is permitted by way of exception only and always requires a qualified justification by the state organ concerned. This would include a serious economic recession. But, at the same time, it is clear that not every "ordinary" recession may be relied upon to again restrict the rights of the Covenant. In the end, the ICESCR is intended precisely to guarantee respect for achieved standards where the economic situation is more unfavourable. *Cost-cutting measures con-*

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[86] The defence is controversial, though. The ICESCR is intended for the protection of the human rights of the individual. As such, it should not be governed by utilitarian principles. See Craven, 1995, p. 132.

[87] Another question is who should decide on the amount of study fees to be charged by institutions of higher education. Should the said institutions be entitled to levy study fees autonomously or should the state lay down a uniform amount binding on all such institutions? The former option has been said to further competition between institutions of higher education which may impact beneficially on the quality of education, but, at the opposite end, it may promote the emergence of elitist institutions for the rich and institutions which offer low-quality education for the poor.

[88] See para. 12 General Comment No. 3, see note 5, which provides for protective measures for the vulnerable members of society in times of severe resource constraints.

sisting of a linear cutting of all state expenses cannot, therefore, be upheld in the education system adjudged under art. 13 ICESCR.[89]

National governments and parliaments customarily do not adjudge the conformity of policies entailing the cutting of costs in the educational sector with the ICESCR. This is regrettable and attests to ignorance on the part of many states parties of international legal obligations.[90]

The nature of state obligations under the ICESCR must not only be determined in the light of article 2(1). Consideration must additionally be given to the way in which obligations are formulated by the individual provisions of the Covenant. These may stipulate that states parties "undertake to respect", that they "recognise" or that they "undertake to guarantee/ensure" the one or other Covenant right. The formulations used bear on the exact meaning of the notion of "progressiveness" with regard to the various provisions of the Covenant. They express differing degrees of urgency in the realisation of Covenant rights.[91] *Obligations "to respect"* essentially imply negative abstention on the part of states parties. Positive duties being of lesser significance with regard to Covenant provisions which use this formulation, the degree of urgency of realisation expressed by the formulation is the lowest found in the Covenant.[92] *Obligations "to recognise"* express a medium degree of urgency of realisation, in fact, that degree of urgency envisaged by article 2(1). The use of the term thus triggers the application of state obligations under article 2(1).[93] The highest degree of urgency of realisation in the Covenant is expressed by *obligations "to ensure/guarantee"*. This formulation virtually excludes the notion of "progressiveness", and the positive action required by the obligation must take place immediately.[94]

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[89] Gebert, 1995, p. 3. This author's italics. Own translation from original German text, "Entscheidend ist nun, daß das Prinzip der progressiven Paktrealisierung Abstriche am einmal erreichten Standard im Bildungswesen . . . grundsätzlich untersagt. Die Rücknahme sozialer, wirtschaftlicher und kultureller Errungenschaften ist nur ausnahmsweise erlaubt und bedarf stets einer qualifizierten Rechtfertigung durch das entscheidende staatliche Organ. Eine schwere wirtschaftliche Rezession gehört wohl dazu. Aber ebenso klar ist, daß nicht jede 'gewöhnliche' Rezession dazu benützt werden kann, die Rechte des Sozialpaktes wieder einzuschränken. Denn dieser Pakt soll gerade in einem wirtschaftlich schwierigeren Umfeld die Respektierung erreichter Standards garantieren. Sparübungen, die aus einer linearen Kürzung aller staatlichen Ausgaben bestehen, vermögen daher im Bildungswesen vor Art. 13 des Sozialpaktes kaum standzuhalten".

[90] See *ibidem* at pp. 3–4.

[91] Gebert, 1996, pp. 143–146 aptly speaks of the "Realisierungsdringlichkeit" of provisions of the ICESCR. It is important to appreciate that the different formulations used do not express differing degrees of legal obligation. All provisions of the ICESCR are legally binding. It needs further to be pointed out that the idea of differing degrees of urgency in the realisation of Covenant rights makes sense only in as far as positive duties under the ICESCR are concerned, as negative duties must always be respected immediately.

[92] See Alston and Quinn, 1987, p. 184.

[93] See *ibidem* at p. 185.

[94] See *ibidem* at pp. 185–186.

Applied to article 13 ICESCR, this means the following:

The first sentence of article 13(1), which accords a general right to education, "recognises" everyone's right to education. Article 13(2), similarly, uses the term "recognise" when describing the duty of states parties to realise an education system at the various levels. The formulations in both instances trigger the application of obligations under article 2(1). The general right to education and an education system at the various levels must, therefore, be realised progressively. Concerning the latter, the degree of urgency of realisation decreases, however, from a high level for primary education (article 13(2)(a)) to successively lower levels for each of secondary, higher and fundamental education (article 13(2)(b) to (d)). Whereas article 13(2)(a) states that primary education "shall be" compulsory and free, article 13(2)(b) and (c) state that secondary and higher education "shall be made" available and accessible,[95] and article 13(2)(d) states that fundamental education "shall be encouraged or intensified as far as possible". This is summarised as follows by paragraph 51 General Comment No. 13:

> As already observed, the obligations of States parties in relation to primary, secondary, higher and fundamental education are not identical. Given the wording of article 13(2), States parties are obliged to prioritise the introduction of compulsory, free primary education. This interpretation of article 13(2) is reinforced by the priority accorded to primary education in article 14. The obligation to provide primary education for all is an immediate duty of all States parties.

The last sentence of paragraph 51 somewhat overstates the nature of state obligations with regard to primary education. The notion of "progressiveness" is not entirely absent from article 13(2)(a). Article 14, it should be noted, refers to a plan which provides for "the progressive implementation", within a reasonable number of years, of compulsory and free primary education, in the case of those states which at the time of becoming party to the Covenant have not yet secured compulsory and free primary education.[96]

The second and third sentence of article 13(1) on the aims of education state that states parties "agree" that education must further these aims. The word "agree" expresses a rather low degree of urgency of realisation.[97] The degree of urgency is similarly low for article 13(3) and (4), which refer to the obligations of states parties to "undertake to have respect" for the

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[95] Art. 13(2)(b) and (c) ICESCR further both refer to "the progressive introduction of free education".

[96] See also Gebert, 1996, p. 145.

[97] See *ibidem* at p. 144.

rights of parents concerning the education of their children, and "not to construe article 13 in such a manner as to interfere with" the right of individuals and bodies to establish and direct private schools, respectively.[98]

Finally, article 13 must be read together with articles 2(2) and 3. Article 2(2) states that states parties "undertake to guarantee" that Covenant rights will be exercised without discrimination and article 3 that they "undertake to ensure" the equal right of men and women to the enjoyment of these rights. In accordance with what has been said above, the degree of urgency of realisation for article 13 read with articles 2(2) and 3 must be considered to be high. As stated by paragraph 1 General Comment No. 3, "[The ICESCR] also imposes various obligations which are of immediate effect. . . . One of these . . . is the 'undertaking to guarantee' that relevant rights 'will be exercised without discrimination . . .'".[99] Paragraph 43 General Comment No. 13 repeats this statement with regard to the right to education. States parties must, therefore, abrogate laws which involve discrimination in education and adopt legislation which prohibits discrimination in education without delay.[100]

2.2.5. *"By All Appropriate Means, Including Particularly the Adoption of Legislative Measures"*

Article 2(1) requires states parties to realise the rights of the Covenant "by all appropriate means, including particularly the adoption of legislative measures".[101] In the discussion which follows, legislative and other measures will be dealt with first, and thereafter judicial remedies and the issue of justiciability will be addressed.

2.2.5.1. *Legislative and other measures*

States parties have a certain amount of discretion in deciding which means to pursue. They may choose between legislative, administrative, financial,

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[98] This does not in any way imply, however, that the negative freedom aspects of art. 13(1), (3) and (4) ICESCR do not apply immediately. It is only the positive social aspects of these provisions which have "a lower rung".

[99] Para. 22 Limburg Principles, see note 7, similarly states, "Some obligations under the Covenant require immediate implementation in full by all States parties, such as the prohibition of discrimination in article 2(2) of the Covenant".

[100] A realistic account will have to point out, however, that the notion of immediacy can only apply with regard to measures which are directed against "active" discrimination. Measures directed against "static" discrimination can only be taken progressively. See in this context the discussions at 6.2.2.1.2.1. *supra* and 9.3.2.1. *infra*. The negative freedom aspects of arts. 2(2) and 3 ICESCR apply immediately, of course.

[101] For comments on this requirement, see Alston and Quinn, 1987, pp. 166–172, De Feyter, 1994, pp. 165–175 and Craven, 1995, pp. 115–128.

social, educational and other means.[102] State discretion is not absolute, however. General Comment No. 3 states:

> While each State party must decide for itself which means are the most appropriate under the circumstances with respect to each of the rights, the "appropriateness" of the means chosen will not always be self-evident. It is therefore desirable that States parties' reports should indicate not only the measures that have been taken but also the basis on which they are considered to be the most "appropriate" under the circumstances. However, the ultimate determination as to whether all appropriate measures have been taken remains one for the Committee to make.[103]

Matthew Craven argues that state discretion is limited by requirements found in the text of the ICESCR itself and by requirements which have been set by the CESCR. As regards the former,[104] he points out that some provisions of the Covenant indicate a method by which a specific right is to be realised. Article 13(2)(a), for example, requires primary education to be compulsory and free, as a method by which to realise the right to education.[105] As regards the latter, he holds that the Committee has laid down certain methodological and certain substantive requirements. Concerning methodological requirements,[106] states parties must, as a first step, monitor and evaluate the actual situation with regard to the enjoyment of Covenant rights, including the right to education. On the basis of their findings, they must, as a next step, formulate a coherent policy as to how they intend to make sufficient progress in the realisation of ESCR. The policy should include benchmarks and timetables to measure the progress made towards the full realisation of ESCR. Concerning substantive requirements,[107] Craven comments that the Committee expects states parties:

- to provide for the participation of the people in the process of fulfilling the rights of the Covenant;[108]
- to pay particular attention to the position of the vulnerable and disadvantaged sectors in society in realising ESCR;[109]

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[102] General Comment No. 3, see note 5, paras. 3 and 7 and Limburg Principles, see note 7, para. 17.

[103] General Comment No. 3, see note 5, para. 4. Para. 20 Limburg Principles, see note 7, is to the same effect.

[104] See Craven, 1995, pp. 116–117.

[105] Other examples are arts. 6(2), 11(2), 12(2) and 15(2) ICESCR.

[106] See Craven, 1995, pp. 117–120.

[107] See *ibidem* at pp. 120–124.

[108] People must have a say in the formulation of educational policy and as regards the running and the curriculum of schools.

[109] States parties must, for example, improve the rates of enrolment and of completion of studies of girls.

- to provide adequate social safety nets in view of the trend towards privatisation of state properties, a trend which tends to render access to what previously have been public services a correlate of income distribution;[110] and
- to uphold some form of democracy.[111]

Article 2(1) mentions in particular the adoption of legislation as a means to realise Covenant rights. The adoption of legislation is not mandatory under the ICESCR. Each state party must decide for itself whether or not legislation is needed.[112] Nevertheless, the CESCR entertains the view that "in many instances legislation is highly desirable and in some cases may even be indispensable".[113] The Committee argues, for example, that it would be difficult to combat discrimination effectively in the absence of a sound legislative foundation for the necessary measures. It also cites education as a field in which legislation may be an indispensable element.[114] Legislation will be required where existing legislation is in violation of the obligations assumed under the Covenant.[115] This would, for example, be the case where a law sanctions or mandates the non-admission of students belonging to a certain racial group to specific schools, because such a law violates article 13 read with article 2(2). From a Western democratic standpoint, legislation will always be required in realising the ICESCR, as in terms of that tradition all state action needs to be buttressed by formal law. Legislation may itself already bring about an improvement in the situation of Covenant rights. More often, however, legislation will rather establish the framework within which measures directly aimed at fulfilling ESCR are taken. It should further be noted that legislation on its own does not suffice to realise the rights of the Covenant. Other means will have to be pursued additionally.[116] These may take many forms: States parties must, for example, take measures to make people aware of the rights of the Covenant, including the right to education. Covenant rights must further be taken into account in the formulation of fiscal, social and cultural policies. States parties will also have to develop concrete programmes which assist disadvantaged social groups. To mention a vivid

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[110] Privatisation in the education sector must, for instance, be buttressed by the state's arranging of adequate study bursary or low-interest credit facility schemes.

[111] It is evident that the education system of an undemocratic state cannot promote as an aim of education a pluralistic world view, as required by art. 13(1) ICESCR.

[112] See Alston and Quinn, 1987, p. 167.

[113] General Comment No. 3, see note 5, para. 3.

[114] *Idem.*

[115] Limburg Principles, see note 7, para. 18.

[116] General Comment No. 3, see note 5, para. 4 and Limburg Principles, see note 7, para. 18.

example, they may have to arrange free transport to schools for pupils whose parents are unable to pay for such transport.

2.2.5.2. *Judicial remedies and justiciability*

Appropriate means within the meaning of article 2(1) for the realisation of the rights of the ICESCR may also include the provision of judicial remedies. This is pointed out by the CESCR in its third General Comment.[117] It notes that the enjoyment of the rights recognised, without discrimination, will often be promoted through the provision of judicial (or other) remedies. It further considers certain other provisions of the ICESCR to be capable of immediate application by judicial (or other) organs. It mentions articles 3, 7(a)(i), 8, 10(3), 13(2)(a), (3) and (4) and 15(3) as examples,[118] and asserts that "[a]ny suggestion that the provisions indicated are inherently non-self-executing would seem to be difficult to sustain".[119]

The justiciability of ESCR has been discussed above in a general sense.[120] In what follows, consideration will first be given to the justiciability of the provisions of the ICESCR, and thereafter to the justiciability of article 13 ICESCR.

A normative provision is justiciable if it can serve as the basis for a judicial or quasi-judicial decision. The notion of justiciability in international law is linked to that of the immediate applicability (or the self-executing character) of treaty provisions. A treaty provision is considered to be immediately applicable (or self-executing), if, once it has been incorporated into domestic law, it can directly be applied domestically without it being necessary to concretise the provision by the adoption of legislation. A treaty

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[117] General Comment No. 3, see note 5, para. 5. The CESCR's comment that (some) provisions of the ICESCR may aptly be protected by judicial remedies is of some importance, as in terms of the *travaux préparatoires* the provision of judicial remedies cannot be considered to constitute an indispensable element of the obligation contained in art. 2(1). See Alston and Quinn, 1987, p. 170.

[118] Art. 3 ICESCR protects the equal right of men and women to the enjoyment of ESCR, art. 7(a)(i) provides for equal remuneration for work of equal value, art. 8 guarantees the right to form and join trade unions and the right to strike, art. 10(3) concerns special measures of protection on behalf of children, art. 13(2)(a) deals with compulsory and free primary education, art. 13(3) assures the liberty of parents to choose for their children non-public schools and to ensure the religious and moral education of their children in conformity with their own convictions, art. 13(4) safeguards the liberty of individuals and bodies to establish and direct educational institutions and art. 15(3) relates to the freedom indispensable for scientific research and creative activity.

[119] Reference should also be made to paras. 8 and 19 Limburg Principles, see note 7. Para. 8 observes that "[a]lthough the full realisation of the rights recognised in the [ICESCR] is to be attained progressively, the application of some rights can be made justiciable immediately while other rights can become justiciable over time". Para. 19 obliges states parties to protect the rights of the ICESCR by providing "effective remedies including, where appropriate, judicial remedies".

[120] See 3.5. *supra.*

provision which is immediately applicable is also justiciable. It may thus be said to be addressed to the judiciary. A treaty provision which is not sufficiently specific, however, and which needs, therefore, to be concretised by legislative measures, lacks immediate applicability and, accordingly, also justiciability. It may thus be said to be addressed to the legislature.[121]

It is sometimes averred that the ICESCR is not immediately applicable and thus also not justiciable. This argument is based on the consideration that the rights provisions of the Covenant impose positive and, hence, non-justiciable duties, and on the observation that Covenant provisions are not specific enough, article 2(1), therefore, specifying the adoption of legislative measures as *the* means to realise Covenant rights.[122] This approach is unscientific, however. Firstly, concerning the positiveness argument, the CESCR has correctly stated that the adoption of a rigid classification of ESCR, which puts them beyond the reach of the courts because they involve the allocation of resources, would be arbitrary, in view of the fact that "courts are generally already involved in a considerable range of matters which have important resource implications".[123] Secondly, concerning the non-specificness argument, immediate applicability must not be determined with regard to the ICESCR as a whole, but with regard to each individual normative provision of the Covenant.[124] In fact, one and the same normative provision may simultaneously entail aspects which are and which are not immediately applicable.[125] When such an approach is adopted, it will be found that, although many aspects of the ICESCR are not, a great many others are specific enough to be considered immediately applicable. The CESCR has thus stated:

> It is especially important to avoid any *a priori* assumption that the norms should be considered to be non-self-executing. In fact, many of them are stated in terms which are at least as clear and specific as those in other human rights treaties, the provisions of which are regularly deemed by courts to be self-executing.[126]

In terms of international law, it is for each state party to a treaty to decide for itself whether it will treat the provisions of the treaty as immediately

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[121] For a discussion of the notion of and the criteria for immediate applicability, concentrating on the ICESCR, see, for example, Craven, 1993, pp. 367–404, at pp. 377–395.

[122] See, for example, the views of government representatives Walkate (the Netherlands) and Weitzel (Luxembourg), appearing before the CESCR at previous sessions, in UN Docs. E/C.12/1989/SR.14, para. 8 and E/C.12/1990/SR.35, para. 44, respectively.

[123] CESCR, General Comment No. 9 (Nineteenth Session, 1998) [UN Doc. E/1999/22] The domestic application of the Covenant [*Compilation*, 2004, pp. 55–59], para. 10.

[124] See Simma, 1989, p. 192.

[125] See Gebert, 1996, p. 124.

[126] General Comment No. 9, see note 123, para. 11.

applicable and justiciable within its national legal system. International law, generally, leaves it to states parties themselves to determine how to perform their obligations under international agreements on the domestic plane. What is important for the purposes of international law is that a state party *in effect* complies with its treaty obligations.[127] At a general level, this is true for the ICESCR, as well. States parties have some leeway when deciding what provisions of the Covenant to treat as justiciable. This is why paragraph 5 General Comment No. 3 directs states parties to provide judicial remedies "with respect to rights which may, *in accordance with the national legal system*, be considered justiciable".[128] Even so, the general principle stated would seem to apply in a more restricted sense in the sphere of international human rights law. Reference should in this regard be made to General Comment No. 9 of the CESCR, dealing with the topic of the domestic application of the ICESCR.[129] There the Committee observes that the central obligation of states parties in relation to the Covenant is to give effect to Covenant rights, and that by requiring them to do so "by all appropriate means", "the Covenant adopts a broad and flexible approach which enables the particularities of the legal and administrative systems of each State, as well as other relevant considerations, to be taken into account".[130] It adds, however, that this flexibility coexists with the fundamental requirement of international human rights law to make available appropriate means of redress, or remedies, to aggrieved individuals.[131] The Committee is of the opinion that a state party which does not provide any domestic legal remedies for violations of ESCR would need to show either that such remedies are not "appropriate means" within the terms of article 2(1) ICESCR or that, in view of the other means used, they are unnecessary. It holds that it will be difficult to show this.[132] The Committee goes on to state:

> The right to an effective remedy need not be interpreted as always requiring a judicial remedy. Administrative remedies will, in many cases, be ade-

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[127] See, for example, Evans, A., "Self-executing treaties in the United States of America", in: *British Yearbook of International Law*, Vol. 30, 1953, pp. 178 *et seqq*., who states at p. 193, "The definition of self-executing treaties, which is essentially a problem of the enforcement of treaties, is a matter to be determined by the municipal law of a given state, interpreted with due consideration of the constitutional history of the State, the organisation of its government, and, indeed, of the political currents of a given period".

[128] Author's italics.

[129] General Comment No. 9, see note 123.

[130] *Ibidem* at para. 1.

[131] *Ibidem* at para. 2. At para. 3, the CESCR refers to art. 8 UDHR, according to which "[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law".

[132] *Ibidem* at para. 3.

> quate. . . . Any such administrative remedies should be accessible, affordable, timely and effective. An ultimate right of judicial appeal from administrative procedures of this type would also often be appropriate. By the same token, there are some obligations, such as (but by no means limited to) those concerning non-discrimination, in relation to which the provision of some form of judicial remedy would seem indispensable in order to satisfy the requirements of the Covenant. In other words, whenever a Covenant right cannot be made fully effective without some role for the judiciary, judicial remedies are necessary.[133]

The Committee's observations in General Comment No. 9 should be endorsed. Furthermore, as has been indicated above, the Committee, in General Comment No. 3, considers judicial (or other) remedies particularly suited to protect the enjoyment of Covenant rights without discrimination and the rights provided for in articles 3, 7(a)(i), 8, 10(3), 13(2)(a), (3) and (4) and 15(3) ICESCR. Whilst the Committee's views on which Covenant provisions are justiciable are not binding *per se*, they are nevertheless of substantial authority, considering the Committee's pivotal role in the implementation of the Covenant,[134] and should, therefore, not lightly be ignored.[135]

Treaty provisions which are not (considered to be) immediately applicable and justiciable, have yet an important role to play. Treaty provisions, which are binding upon a state party, should generally influence the interpretation of domestic legislation on relevant issues. Where a law is ambiguous, judges should opt for that interpretation which is consistent with state obligations under international agreements. This includes state obligations under the ICESCR.[136]

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[133] *Ibidem* at para. 9.

[134] See Craven, 1993, pp. 383–384. Tomuschat, C., "National implementation of international standards on human rights", in: *Canadian Human Rights Yearbook*, 1984–1985, pp. 31 *et seqq.*, comments at p. 42 with regard to the ICCPR, "Since the Human Rights Committee, the body primarily entrusted with responsibility for ensuring compliance with the CCPR, sees no obstacle against inferring directly enforceable obligations from the CCPR, national authorities would lack any justification for adopting a more reluctant attitude". Such arguments equally apply to the CESCR.

[135] The importance the CESCR attaches to the provision of effective remedies is apparent also from para. 6 General Comment No. 3, see note 5, which calls upon states parties to inform the Committee, where specific policies aimed at the realisation of Covenant rights have been adopted in legislative form, whether such laws create any right of action on behalf of those who feel that their rights are not being fully realised, and further to inform it, in cases where constitutional recognition has been accorded to specific ESCR, or where the provisions of the Covenant have been incorporated directly into national law, of the extent to which these rights are considered to be justiciable.

[136] See Alston and Quinn, 1987, p. 171 and De Feyter, 1994, p. 175. Craven, 1993, pp. 395–403 speaks of the indirect effect of treaties in this respect. See also General Comment No. 9, see note 123, para. 15.

The discussion will now turn to an analysis of the justiciability of article 13 ICESCR.[137]

It has been stated earlier on that justiciability is a "fluid" concept.[138] Accordingly, it is quite conceivable for a state to accord to its courts the competence to negatively review government action aimed at the realisation of article 13. Courts could be granted the competence to review such action for its sincerity and rationality, *i.e.* to ask whether a statute, an administrative act or the state budget, in so far as they relate to the realisation of the right to education, is justified in terms of article 13. The matter has, however, already been addressed above.[139] Certain aspects of article 13 are justiciable in a more apparent manner.

Human rights provisions in international agreements have been stated to be justiciable if they satisfy the following requirements:

- They must impose on the state party a clearly defined duty.
- Compliance therewith must be possible without it being necessary for the state party to take further legislative measures.
- They must not leave to the state party a "choice of policy" in the implementation of the international obligation.[140]

An application of these requirements will show that article 13(3), protecting the right of parents to choose for their children non-public schools and to ensure their religious and moral education in conformity with their own convictions, and article 13(4), protecting the right of individuals and bodies to establish and direct private schools, are good candidates for justiciability.[141] These provisions prescribe a specific course of conduct for states parties. Compliance therewith is possible without it being necessary for states parties to take further legislative measures. Article 13(3) and (4) are examples of obligations to respect. The provisions are negative and oblige states parties not to interfere with individual freedoms. This is emphasised by the use of the term "liberty" in both provisions. The provisions leave no "choice of policy" to states parties.[142]

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[137] See also Chapter 10 *infra*, which will indicate the justiciability of each individual guarantee of art. 13 ICESCR.

[138] See 3.5. *supra.*

[139] See 3.5. *supra.*

[140] See Coomans and Jansen, 1991, p. 189. The authors, additionally, refine the requirements, by stating that the situation to which the international legal norm is to be applied, must lend itself to justiciability, *i.e.* the case and the context must be sufficiently structured and concretised.

[141] This view is shared by, for example, Alston, 1990, p. 380, Coomans, 1995, pp. 20–21 and the CESCR, in General Comment No. 3, see note 5, para. 5.

[142] See Coomans, 1995, pp. 20–21.

Likewise, the aims of education set out in article 13(1) include justiciable aspects. In as far as they imply obligations to respect, the same reasoning applies to them, as to article 13(3) and (4). Nothing inhibits a judge from finding that totalitarian tendencies in education, which leave no room for the development of the individual's personality, infringe the educational aim of "the full development of the human personality". Similarly, a judge would be competent to find that educational materials which propagate, for example, racial hatred, infringe the educational aim of "[promoting] understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups".[143]

The CESCR, in paragraph 5 General Comment No. 3, considers article 13(2)(a), which requires primary education to be compulsory and available free to all, to be justiciable. To the extent that a state party has set up an educational infrastructure which provides for compulsory and free primary education, the Committee's statement is undisputed. In these circumstances, the concepts "compulsory" and "free" are sufficiently precise to be susceptible to judicial determination.[144] It is more difficult though to imagine a court ordering the state to set up such an infrastructure in the first place. Setting up that infrastructure requires extensive legislative and administrative measures, entailing wide policy choices. Where the said infrastructure does not already exist, article 13(2)(a) appears, therefore, to be addressed primarily to the legislative and administrative organs of government.[145] At the same time, it needs to be emphasised that compulsory and free primary education is of crucial importance. Primary education constitutes a basic human need. Without it, the individual is doomed to live a life with few opportunities to be successful. Primary education, as will be explained later, forms part of the core content of the right to education.[146] If this is appreciated, the claim that article 13(2)(a) should, in some way or another, be justiciable, where a state party has not yet set up a system of compulsory and free primary education, seems legitimate. It is quite conceivable for a court to find that a government which, in a grossly negligent manner, fails to take steps aimed at setting up such a system, is in dereliction of its duty. The court could not, however, prescribe to the government which specific steps to take to remedy the situation. But, it

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[143] See Gebert, 1996, pp. 326–327.

[144] See, for example, Coomans, 1995, who at p. 21 states that "[t]he right to primary education lends itself, in my view, for justiciability . . . because it is already fully implemented in the national legislations and practices of many countries". See also Gebert, 1996, p. 373.

[145] See Gebert, 1996, p. 373.

[146] See 12.3.2.3.2.1. *infra.*

could direct the government to take "appropriate" steps within a reasonable period of time.

Good candidates for justiciability are further the prohibition of discrimination under article 2(2) and the guarantee of equality between men and women in terms of article 3, read with article 13.[147] Notably, the right of access to educational institutions without discrimination of any kind is justiciable. This has been confirmed with regard to article 2 First Protocol ECHR by the European Court of Human Rights in the famous *Belgian Linguistic Case*.[148] According to the Court, the first sentence of article 2 entails a justiciable right to non-discriminatory access to educational institutions existing at a given time.[149] Generally speaking, justiciability is limited to those instances where states parties fail to comply with their negative duty not to discriminate in education. The positive duties covered by articles 2(2) and 3 read with article 13 are not readily justiciable.[150]

Finally, there is yet another way in which article 13 is justiciable. At issue here is the taking of retrogressive measures in the process of realising article 13. Such measures will often be justiciable.[151] This can be illustrated with regard to the introduction or increase of study fees at the secondary or tertiary level of education.[152] Article 13(2)(b) and (c) impose on states parties a clearly defined duty not to introduce or increase study fees at these levels. The duty to make secondary and tertiary education accessible, "in particular by the progressive introduction of free education", *e contrario* clearly excludes measures which introduce or increase study fees. In the words of Cohen:

> [T]o touch on the free nature of education once realised is directly in conflict with the only means explicitly mentioned in the text of the treaty for making education at [those levels] accessible to all. The use of the word "progressively" . . . thus makes it particularly difficult to actually act retrogressively.[153]

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[147] This is also the view of, for example, Alston, 1990, p. 380, Coomans, 1995, p. 21 and the CESCR, in General Comment No. 3, see note 5, para. 5.

[148] *Case "relating to certain aspects of the laws on the use of languages in education in Belgium" (Merits)*, Judgement of 23 July 1968, Publications of the European Court of Human Rights, Series A, Vol. 6, p. 35, para. 11.

[149] See 5.2.1.1.3. *supra.*

[150] See also the discussion at 9.3.2.2. *infra.*

[151] The topic of deliberately retrogressive measures is also dealt with at 9.2.2.4. *supra*, 9.4. *infra* and 12.3.2.3.2.5. *infra.*

[152] The discussion is based on Coomans and Jansen, 1991, pp. 187–197.

[153] Cohen, 1983, pp. 385–386. Own translation from original Dutch text, "[A]antasting van de verworven kosteloosheid is rechtstreeks in strijd met het in de verdragstekst als enige met name genoemde middel om onderwijs op dit niveau voor ieder toegankelijk te maken. Gebruik van het woord 'geleidelijk' . . . maakt het vervolgens bij uitstek moeilijk om juist regressief te handelen".

Compliance with the prohibition of introducing or increasing study fees is, furthermore, possible without it being necessary for states parties to take further legislative measures. States parties must simply refrain from making any law or regulation which provides for the introduction or increase of study fees! The prohibition does not, moreover, leave to states parties a "choice of policy". States parties may freely decide how to make secondary and higher education accessible to all. This is to be achieved "by every appropriate means". They may also freely determine the pace at which to do so. But, states parties do not have a "choice of policy" as regards the possible introduction or increase of study fees. Article 13(2)(b) and (c) are clear in this regard. Consequently, a measure which introduces or increases study fees in secondary or higher education must be held to be manageable for judicial review. In that case, states parties would have to attempt justifying the measure.

2.3. *The Value of Article 2(1) ICESCR in Times of Economic Hardship*

The ICESCR and its key provision, article 2(1), were drafted in the 1950s and 60s, a time when there existed world-wide optimism regarding the growth of the economy—hence, the emphasis in article 2(1) on the progressive realisation of ESCR. In many countries, however, the economy did not grow as expected. In fact, in many countries there has been no economic growth whatsoever, or, even worse, the economic situation has deteriorated. In view of the unfavourable economic development in many countries, it has been stated:

> With the collapse of the underlying economic assumptions in a world progressively marked by serious symptoms, the [ICESCR] itself now seems to have lost some of its cornerstones.[154]

This view should not be supported, however. Particularly in times of economic hardship, states parties must take all measures possible and incur expenses to maintain the level of realisation of ESCR. In these circumstances, vulnerable members of society need special protection. It is in this context that the legal guarantees of the ICESCR assume specific importance.[155] This has been well formulated by Bruno Simma, a former member of the CESCR. He states:

> The Covenant had sometimes been described as a "good weather instrument" which was a product of the exaggerated optimism of the 1960s about the

[154] Tomuschat, C., "Human rights in a world-wide framework: Some current issues", in: *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, Vol. 45, 1985, pp. 547–584, at p. 567.
[155] See Coomans, 1992, pp. 39–43.

> possibility of sustained economic growth. It was stated to be losing importance because of current world-wide economic conditions. That attitude was based on false reasoning: just as conditions of political unrest constituted the decisive test for the relevance of the International Covenant on Civil and Political Rights, so, in time of economic crisis, the International Covenant on Economic, Social and Cultural Rights should assume its most important function—that of a last ditch defence for the most vulnerable.[156]

Debt-servicing problems, austerity programmes, economic recession or simple poverty do not exempt states parties from their obligations under the ICESCR. Irrespective of the economic situation, states parties must at all times, as has been stated above,[157] fulfil the "minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each [Covenant right]".[158] As regards the right to education, this means "the most basic forms of education".[159] The CESCR has held that, where the available resources to realise such minimum essential levels are demonstrably inadequate, the obligation remains for states parties to strive to ensure the widest possible enjoyment of rights under the prevailing circumstances.[160] This is also true for the right to education. Investment in education is of such importance to long-term economic and social development, that it must be safeguarded in times of crisis. Resource constraints further do not eliminate the obligations to monitor the extent of realisation of ESCR and to devise strategies and programmes for their promotion.[161] The Committee has also underlined that in times of severe resource constraints, vulnerable members of society must be protected by the adoption of relatively low-cost targeted programmes.[162]

3. *Article 2(2) ICESCR: Non-discrimination and Equality with Regard to Covenant Rights*

Article 2(2) ICESCR is a non-discrimination provision. It prohibits discrimination on specified grounds in the exercise of the rights protected under the ICESCR, thus, also the right to education in article 13 ICESCR. Article 2(2) provides as follows:

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[156] Simma, UN Doc. E/C.12/1990/SR.15, para. 7.
[157] See 9.2.2.3. *supra.*
[158] General Comment No. 3, see note 5, para. 10.
[159] *Idem.*
[160] *Ibidem* at para. 11.
[161] *Idem.*
[162] *Ibidem* at para. 12.

> The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[163]

In what follows, article 2(2) ICESCR will be examined.[164] First of all, it will be examined whether article 2(2) is only directed at discriminatory conduct on the part of states parties or whether, in fact, it also enjoins them to realise equal opportunities and equal treatment for all in the enjoyment of Covenant rights, including the right to education. Next, the nature of state obligations under article 2(2) will be considered: Are the obligations of an immediate character or are they progressive in nature? Is article 2(2) justiciable? To what extent are affirmative action measures legitimate or even required by article 2(2)? And, does article 2(2) also apply to private discrimination? Lastly, there will be an analysis of the meaning of discrimination under article 2(2), the scope of article 2(2), and the grounds upon which it prohibits discrimination, giving special attention to the grounds of nationality, language and minority status.

Whenever appropriate, the discussion will refer to the Limburg Principles and General Comment No. 13.

3.1. *Article 2(2) ICESCR: Mere Non-discrimination or Also Substantive Equality?*

The phrase in article 2(2) ICESCR that states parties "undertake to guarantee" the rights of the Covenant without discrimination, makes it clear that, on the one hand, states parties have a negative duty not to act in such a manner as to discriminate against any person in the exercise of Covenant rights and that, on the other, they will also have to take certain positive steps against discrimination. States parties will have to abrogate statutory provisions and administrative instructions which involve

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[163] Art. 3 ICESCR constitutes an affirmation of the stipulations of art. 2(2), on stronger terms though, in the context of gender discrimination. Art. 3 states, "The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant". A discussion of art. 2(2) is, therefore, also relevant to an interpretation of art. 3.

[164] The equivalent provision in the CRC is art. 2 of that Convention. Art. 2(1) states, "States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status". Art. 2(2) states, "States parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members".

discrimination, and they will have to adopt legislation which prohibits discriminatory conduct. These positive steps are directed against what has been termed "active" discrimination above.[165] The question, however, is whether article 2(2) also obliges states parties to take positive steps directed against "static" discrimination.[166] In other words, must states parties make an effort to achieve equal opportunities and equal treatment for all in the enjoyment of Covenant rights, including the right to education?

Although article 2(2) ICESCR, unlike the CDE,[167] does not expressly instruct states parties to realise substantive (as opposed to formal) equality in the exercise of the rights protected, an obligation to this effect should be read into article 2(2). This may be justified on the basis of, firstly, the text of the Covenant and, secondly, the approach of the CESCR towards the issue.

A number of provisions of the ICESCR embody the idea of substantive equality. This suggests that article 2(2) should be interpreted as also covering this idea. Article 3, for example, provides for the "equal right" of men and women to the enjoyment of ESCR. The *travaux préparatoires* show that the drafters of the Covenant intended that article 3 should be utilised to increase factual equality between men and women regarding Covenant rights.[168] Reference may also be made to article 7(c), which speaks of the "[e]qual opportunity for everyone to be promoted in his employment . . .". The implication is that states parties must remove legal and factual barriers to promotion and that they must take positive measures to promote the chances of groups that are underrepresented in higher management positions.[169] Then there is article 13(2)(c), in terms of which higher education must "be made equally accessible to all, on the basis of capacity, by every appropriate means . . .". To state that states parties must make higher education "equally accessible to all" and that they must use "every appropriate means" to this end, thus also extensive positive measures, must necessarily be understood as a direction to states parties to establish substantive equality as regards access to higher education.[170] It may further be stated that article 13, as a whole, embodies the idea of substantive equality in the educational sphere. Making education at the various levels generally available and accessible to all, as required by article 13(2), simultaneously contributes to achieving equal opportunities and equal treatment

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[165] See 6.2.2.1.2.1. *supra.*
[166] *Idem.*
[167] See also 6.2.2.1.1. *supra.*
[168] See Craven, 1995, pp. 158–159.
[169] See *ibidem* at p. 158.
[170] See *idem.*

for all in the enjoyment of the right to education.[171] The English member of the Human Rights Commission at the time for this reason stated that article 13, rather than granting a right to education, accorded to every person the right to profit from education under conditions of equality.[172]

But, also the approach of the CESCR supports a reading of article 2(2), which considers the idea of substantive equality to be implicit in the article. General Comment No. 1 on the objectives of the system of state reports, for example, mentions as one of the objectives that reporting ensures that states parties "[monitor] the actual situation with respect to each of the rights on a regular basis", and that in the process "special attention [should] be given . . . to any specific groups or subgroups which appear to be particularly vulnerable or disadvantaged".[173] The implication is that in realising Covenant rights, states parties should give special attention to fighting factual discrimination. Fighting factual discrimination requires states parties to take positive action, aimed at ensuring the equal enjoyment of rights. Furthermore, CESCR members have made numerous references to equality of access and opportunity. It has thus been commented that a higher proportion of unemployed women in a state party suggested a certain amount of inequality in education and training.[174] Concern has also been expressed over situations where the number of girls in education is lower than that of boys.[175] Moreover, General Comment No. 13 clearly recognises the obligation of states parties to redress "static" discrimination in the education system:

> States parties must closely monitor education—including all relevant policies, institutions, programmes, spending patterns and other practices—so as to identify and take measures to redress any *de facto* discrimination. Educational data should be disaggregated by the prohibited grounds of discrimination.[176]

In conclusion, the idea of substantive equality should be read into article 2(2). This has the effect that, by the terms of article 2(2), states parties must guarantee substantive equality in the enjoyment of the rights of the Covenant, including the right to education. It is important to appreciate, however, that substantive equality refers to equality of opportunity and treatment,

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[171] Gebert, 1996, p. 174 considers art. 13 ICESCR to be a "*Programm mit antidiskriminierender Tendenz*" (programme with anti-discriminatory tendencies).

[172] See UN Doc. E/CN.4/SR.285, p. 6.

[173] CESCR, General Comment No. 1 (Third Session, 1989) [UN Doc. E/1989/22] Reporting by States parties [*Compilation*, 2004, pp. 9–11], para. 3.

[174] See Muterahejuru, UN Doc. E/C.12/1987/SR.5, p. 10, para. 4.

[175] See Texier, UN Doc. E/C.12/1988/SR.14, p. 7, para. 40, Alston, UN Doc. E/C.12/1988/SR.17, p. 8, para. 48 and Rattay, UN Doc. E/C.12/1990/SR.31, p. 4, para. 13.

[176] General Comment No. 13, see note 10, para. 37.

not to equality of result. Equality of result requires a numerically equal distribution of goods, services and advantages. This would make reasonable differentiations between persons, notably on the basis of merit, untenable. The attainment of equality of result is generally recognised to be neither desirable nor, in fact, possible.[177]

3.2. *The Nature of State Obligations Under Article 2(2) ICESCR*

3.2.1. *Immediate or Progressive Implementation?*

Paragraph 31 General Comment No. 13[178] states in part:

> The prohibition against discrimination enshrined in article 2(2) of the Covenant is subject to neither progressive realisation nor the availability of resources; it applies fully and immediately to all aspects of education and encompasses all internationally prohibited grounds of discrimination.

This statement of the CESCR is somewhat imprecise. A realistic account will have to point out that the notion of immediacy can only apply with regard to measures which are directed against "active" discrimination. States parties must, therefore, abrogate laws which involve discrimination in education and adopt legislation which prohibits discrimination in education without delay. Measures directed against "static" discrimination can only be taken progressively. States parties will have to formulate a long-term policy aimed at promoting equality of opportunity and treatment in education and apply it in practice. In the process, states parties will have to adopt extensive legislative and administrative measures, entailing wide policy choices. The Limburg Principles[179] are more specific than the Committee's statement. Paragraph 37 Limburg Principles states:

> Upon becoming a party to the Covenant, States shall eliminate *de iure* discrimination by abolishing without delay any discriminatory laws, regulations and practices (including acts of omission as well as commission) affecting the enjoyment of economic, social and cultural rights.

Paragraph 38 states:

> *De facto* discrimination occurring as a result of the unequal enjoyment of economic, social and cultural rights, on account of a lack of resources or otherwise, should be brought to an end as speedily as possible.

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[177] See Craven, 1995, pp. 156–157. As has been stated by a CESCR member, "'Full' realisation of the economic, social and cultural rights recognised in the Covenant did not mean equalling out for all persons in the areas concerned but the fact that everyone was entitled, *de facto*, to the equal opportunity to enjoy his rights with dignity". See Taya, UN Doc. E/C.12/1990/SR.46, p. 9, para. 42.

[178] See note 10.

[179] See note 7.

3.2.2. *The Justiciability of Article 2(2) ICESCR*

It has been stated above that article 2(2) is justiciable in instances where states parties fail to comply with their negative duty not to discriminate against individuals in the enjoyment of Covenant rights. Paragraph 35 Limburg Principles[180] has these instances in mind, when it requires article 2(2) to "be made subject to judicial review and other recourse procedures". The positive duties covered by article 2(2) are not readily justiciable.[181]

But, there also exists another basis upon which an aggrieved individual may approach a judicial or other tribunal, where he has been discriminated against in the exercise of his ESCR, including his right to education. Article 2(3) *ICCPR* expects states parties to place an effective remedy at the disposal of a person whose rights under the ICCPR have been violated.[182] One of the rights is that contained in article 26 ICCPR. Article 26 states:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

According to the Human Rights Committee, which supervises the ICCPR, article 26 is an "autonomous" provision. This means that article 26 prohibits discrimination *generally* and not only in respect of the rights protected by the ICCPR.[183] As a result, article 26 may also be relied on in cases of discrimination affecting ESCR.[184] Where a state party has ratified the First Optional Protocol to the ICCPR, the possibility exists further of bringing a case of discrimination in the sphere of ESCR, including the right to education, before the Human Rights Committee.[185]

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[180] *Idem*.

[181] See 9.2.2.5.2. *supra*.

[182] Art. 2(3) ICCPR has been fully cited in note 81 in Chapter 3.

[183] HRC, General Comment No. 18 (Thirty-Seventh Session, 1989) Non-discrimination [*Compilation*, 2004, pp. 146–148], para. 12.

[184] This is the effect of the HRC decisions in the cases of *F.H. Zwaan-de Vries v. the Netherlands*, HRC, Communication No. 182/1984, 09/04/1987, UN Doc. CCPR/C/29/D/182/1984 and *S.W.M. Broeks v. the Netherlands*, HRC, Communication No. 172/1984, 09/04/1987, UN Doc. CCPR/C/29/D/172/1984, which have held that art. 26 ICCPR can be relied on to protect the equal exercise of the right to social security, an ESCR. See 3.4.1. *supra*, particularly at note 130.

[185] For examples of relevant cases dealt with by the HRC, see the cases discussed at 9.3.3.3.3.3. and 10.5.2.2. *infra*.

3.2.3. *Affirmative Action Measures*

Affirmative action measures involve the adoption of special measures to benefit economically, socially or culturally deprived groups.[186] The ICESCR does not refer to affirmative action measures. As has been shown above, article 1(4) CERD[187] and article 4(1) CEDAW[188] explicitly confirm the legitimacy of affirmative action measures to accelerate factual equality between racial groups and men and women, respectively. On this basis, it has been argued that a contrary interpretation in the context of the ICESCR would display an "extraordinary lack of congruence".[189] The CESCR has, indeed, commented that affirmative action measures may constitute a legitimate means to achieve equality for men and women and disadvantaged groups. Commenting on article 13, the Committee has observed:

> The adoption of temporary special measures intended to bring about *de facto* equality for men and women and for disadvantaged groups is not a violation of the right to non-discrimination with regard to education, so long as such measures do not lead to the maintenance of unequal or separate standards for different groups, and provided they are not continued after the objectives for which they were taken have been achieved.[190]

The legitimacy of affirmative action measures in the context of the ICESCR is, therefore, not disputed. Less clarity prevails on the question whether such measures are, in fact, compulsory. So far, the CESCR has not made an express statement in this regard. With regard to the ICCPR, the Human Rights Committee has held that "the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant".[191] On this basis, it could be argued that affirmative action measures may, likewise, sometimes be required in the realisation of the ICESCR.

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[186] See Craven, 1995, p. 184.
[187] See 4.4.2. *supra*.
[188] See 4.4.3. *supra*.
[189] Thornberry, P., *International Law and the Rights of Minorities*, 1991, p. 284.
[190] General Comment No. 13, see note 10, para. 32. A similar statement has been made on affirmative action measures in the context of the ICESCR generally, in para. 39 Limburg Principles, see note 7. Para. 39 states, "Special measures taken for the sole purpose of securing adequate advancement of certain groups or individuals requiring such protection as may be necessary in order to ensure to such groups or individuals equal enjoyment of economic, social and cultural rights shall not be deemed discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different groups and that such measures shall not be continued after their intended objectives have been achieved".
[191] General Comment No. 18, see note 183, para. 10.

Whenever a state party adopts affirmative action measures, it must be in a position to demonstrate that such measures are intended to remedy a situation of disadvantagement. There must further exist a relationship of proportionality between the affirmative action measures and the aim of achieving factual equality. The measures must be a suitable, necessary and appropriate means to achieve that aim. Additionally, the affirmative action measures must not lead to the maintenance of unequal standards for different groups and they must be discontinued immediately once the aim of equalisation has been achieved.

Affirmative action measures may take different forms. At one level, they may involve *special positive programmes* in favour of disadvantaged groups, notably, in the form of the provision of special benefits to such disadvantaged groups, such as food, housing or education. This form of affirmative action is quite uncontroversial. Nowadays, most states operate programmes in terms of which certain groups are accorded special benefits. It has thus been suggested with regard to article 13 that primary and secondary school students from less privileged groups should be given more attention inside and outside school. Special programmes for the provision of support staff should be instituted, the best teachers should be assigned and learning-support centres should be build. In short, greater financial and human resources should be allocated to school areas with greater economic, social and cultural problems than to school districts inhabited by families with higher income.[192]

At another level, affirmative action measures may take the form of *quota systems* in public education or employment. Quota systems envisage the apportionment of social goods on the basis of suspect classifications, such as race or gender, so as to achieve a form of equality of result. Quota systems are more controversial. They may be criticised on a number of grounds:

- It is not fair to force innocent persons to bear the burdens of redressing grievances not of their making.
- The level of societal injury which must be exceeded for a certain group to qualify for special treatment under a quota system can only be laid down arbitrarily. The result is that groups which do not qualify may yet have similar claims to equality of opportunity.

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[192] See Ferrer, 1998, para. 23 (UN Doc. E/C.12/1998/20). Rather than speaking of affirmative action measures, Ferrer prefers to use the term "programmes to remedy inequalities in education", as, in his view, this expresses the idea of compensating for an obvious social imbalance better. Ferrer, at para. 17, considers an educational policy which does not provide for "programmes to remedy inequalities in education", to be a "bogus policy of equality".

- Quota systems may reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor not related to individual worth.
- Quota systems may serve to exacerbate antagonism between groups rather than alleviate them.[193]

Quota systems have, however, also been justified on the basis that the advancement of less privileged groups constitutes as relevant a reason for the apportionment of social goods as, for example, capacity and merit.[194]

Article 13(2)(c) seems to rule out the possibility of quota systems in the context of access to higher education. By providing that higher education must be made equally accessible to all, "on the basis of capacity", it appears that other grounds, such as that of social disadvantagement, may not play a role. Yet, the CESCR has so far not objected to the imposition of quota systems in the educational sphere.[195] Altogether, the question whether or not quota systems are justifiable under the ICESCR remains open.

An interesting approach to the matter of quota systems in higher education, which may fruitfully guide the interpretation of article 13(2)(c), is that followed by the US Supreme Court. This forbids rigid quotas, but—for the purpose of attaining a diverse student body—allows the flexible consideration of a suspect classification, such as race, as one factor among many for admission to an institution of higher education. In the case of *Regents of the University of California v. Bakke*,[196] decided in 1978, the Court had to rule on the constitutionality of a quota system operated by a university in the light of the Equal Protection Clause of the US Constitution. *In casu*, the Medical School of the University of California had operated an admissions programme in terms of which a certain number of admission seats were exclusively reserved for students from certain racial groups.[197] Justice Powell, announcing the judgement of the Court, held that institutions of higher education enjoyed a right to educational autonomy, which included the right to operate admissions programmes which pursued the goal of attaining a(n) (ethnically) diverse student body. He stated that a student with a particular background "may bring to a professional school . . .

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[193] These points of criticism have been drawn from the decision of the US Supreme Court in the case of *Regents of the University of California v. Bakke* 483 U.S. 265 (1978), para. III.B.

[194] See Craven, 1995, p. 187.

[195] Quota systems referred to in an approving way, have, for example, included measures to ensure ethnic balance in schools. See Badawi El Sheikh, UN Doc. E/C.12/1989/SR.10, p. 10, para. 59.

[196] 483 U.S. 265 (1978).

[197] Whereas black applicants competed for all 100 admission seats, white applicants could compete for 84 seats only. Thus, 16 seats had been exclusively reserved for black applicants.

experiences, outlooks and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity". Student body diversity, in his view, was a compelling state interest.[198] Justice Powell held further, however, that the assignment of a fixed number of places to a minority group was not a necessary means towards that end. But, he also stated that race could legitimately constitute one among many grounds, such as personal talents, work experience or leadership potential, to be flexibly used in awarding admission seats, as long as every applicant had the opportunity to compete for every seat in the class.[199] The Court accordingly found the quota system in this case to be unconstitutional. Twenty-five years later, in 2003, the US Supreme Court again dealt with quota systems in higher education. In the case of *Grutter v. Bollinger* et al.,[200] the Court had to rule on the constitutionality of the admissions programme of the Law School of the University of Michigan. The admissions programme provided for the use of race to enrol a "critical mass" of underrepresented minority students, to ensure their ability "to make unique contributions to the character of the Law School". It sought to achieve a diverse student body, and race was to be used as one among many diversity contributions in a flexible assessment of every applicant's talents, experiences and potential. The Court explicitly adopted the diversity rationale of Justice Powell's judgement in the case of *Bakke* and held that "student body diversity is a compelling state interest that can justify the use of race in university admissions",[201] emphasising that it "'better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals'".[202] Also following Justice Powell's judgement, the Court held that rigid quotas, which exclusively reserved for certain minority groups a certain fixed number of opportunities, were unconstitutional. An admissions programme, however, which permitted the flexible consideration of race as a "plus" factor in any given case, while still ensuring that each candidate competed with all other qualified applicants, was constitutional.[203] The Court accordingly upheld the admissions programme in this case. In the case of *Gratz and Hamacher v. Bollinger* et al.,[204] decided on the same date, the Court, for the above reasons, rejected a

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[198] See at para. IV.D. of the judgement.

[199] See *ibidem* at paras. V.A.-C.

[200] *Grutter v. Bollinger* et al., US Supreme Court, Judgement of 23 June 2003, available on the website of the Supreme Court of the United States at www.supremecourtus.gov.

[201] *Ibidem* at para. II.A.

[202] *Ibidem* at para. III.A.

[203] See *ibidem* at para. III.B.

[204] *Gratz and Hamacher v. Bollinger* et al., US Supreme Court, Judgement of 23 June 2003, available on the website of the Supreme Court of the United States at www.supremecourtus.gov.

formalistic point-system plan used by the University of Michigan to admit undergraduates, which automatically awarded points towards admission based solely upon race, without regard to the individual contribution the applicant would make to the goal of diversity.

3.2.4. *Private Discrimination*

Unlike article 2(1)(d) CERD and article 2(e) CEDAW, which oblige states parties to take all appropriate means to eliminate discrimination by third parties, the ICESCR makes no reference to discrimination between private persons or bodies. The fact, however, that states parties in article 2(2) "undertake to guarantee" that the rights of the Covenant will be exercised without discrimination, suggests that article 2(2) also extends to discrimination in the private sphere.[205]

The question, of course, is to what extent this is the case. It is held that article 2(2) should apply to discrimination in the private sphere to the extent that states parties bear an obligation to control private activities in relation to the substantive provisions of the Covenant. Strictly personal and social relationships are not subject to state regulation, as here the values of individual freedom and privacy reign supreme. State regulation is required where private activities are performed in the public sphere. Paragraph 40 Limburg Principles[206] accordingly states:

> Article 2(2) demands from States parties that they prohibit private persons and bodies from practicing discrimination in any field of public life.

The CESCR has recognised the need for the adoption of measures directed against private discrimination in fields of public life in a General Comment on the rights of persons with disabilities. The Committee states:

> [There is a need] to ensure that not only the public sphere, but also the private sphere, are, within appropriate limits, subject to regulation. . . . In a context in which arrangements for the provision of public services are increasingly being privatised and in which the free market is being relied on to an ever greater extent, it is essential that private employers, private suppliers of goods and services, and other non-public entities be subject to both non-discrimination and equality norms. . . .[207]

In the educational field, private discrimination might occur in the context of the right of individuals and bodies to establish and direct private educational institutions, protected in article 13(4). Clearly, such institutions

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[205] See Craven, 1995, p. 190.
[206] See note 7.
[207] CESCR, General Comment No. 5 (Eleventh Session, 1994) [UN Doc. E/1995/22] Persons with disabilities [*Compilation*, 2004, pp. 25–35], para. 11.

operate in the public sphere. Education is a public function.[208] Although the importance of freedom in this domain cannot be overemphasised, it must be accepted that the ultimate responsibility concerning private education rests with the state. The state will have to regulate basic aspects regarding access to, treatment in, and minimum academic standards applicable to private schools. This is, in fact, recognised by the proviso in article 13(4) that "the education given in such institutions shall conform to such minimum standards as may be laid down by the State". With regard to the stated matters, states parties would, under article 2(2), also have to take steps to prohibit private discrimination.

3.3. *The Meaning of Discrimination Under Article 2(2) ICESCR, the Scope of Article 2(2), and the Grounds upon Which It Prohibits Discrimination*

Article 2(2) does not define the term "discrimination". The implication is that "discrimination" must be accorded its general meaning under international law. Paragraph 31 General Comment No. 13[209] confirms this in the context of article 13. Paragraph 31 states in part:

> The Committee interprets articles 2(2) and 3 in the light of the UNESCO Convention against Discrimination in Education, the relevant provisions of the Convention on the Elimination of All Forms of Discrimination against Women, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Rights of the Child and the ILO Indigenous and Tribal Peoples Convention, 1989 (Convention No. 169). . . .[210]

An indication of how the CESCR interprets the term "discrimination" may be found in the Committee's reporting guidelines on the subject of article 6, which protects the right to work. The Committee there defines "discrimination" as

> any distinctions, exclusions, restrictions or preferences, be it in law or in administrative practices or in practical relationships, between persons or groups of persons, made on the basis of race, colour, sex, religion, political opinion, nationality or social origin, which have the effect of nullifying or impairing the recognition, enjoyment or exercise of equality of opportunity or treatment in employment or occupation.[211]

As has been explained in the discussion of article 1 CDE above, the concept of discrimination in international law entails the following aspects: a

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[208] This is vividly demonstrated in the passage taken from the case of *Brown v. Board of Education of Topeka* 347 U.S. 483 (1954), quoted at 2.2. *supra*.

[209] See note 10.

[210] See also para. 41 Limburg Principles, see note 7, which is to the same effect.

[211] See UN Doc. E/C.12/1991/1, question 3(a) of the questions on art. 6 ICESCR.

difference in treatment, which is based upon certain prohibited grounds, the purpose or effect of which is to nullify or impair equality, in selective fields. All these aspects are included in the Committee's definition. The different aspects will not be dealt with again, except for the selective fields to which article 2(2) applies and the grounds upon which it prohibits discrimination.[212]

Article 2(2) prohibits discrimination in relation to a broad range of rights, namely, "the rights enunciated in the present Covenant". However, by specifically referring to the rights of the ICESCR, article 2(2) would appear to be a subordinate provision, which prohibits discrimination only in so far as it relates to Covenant rights. In fact, discrimination would seem to be prohibited only where it relates to an aspect of a Covenant right actually covered by the terms of the ICESCR. It has thus been stated with regard to article 13 that

> article 2(2) ICESCR does not prohibit discrimination within the whole education system generally, but only with regard to the individual guarantees of article 13 ICESCR.[213]

Although this position would appear to be corroborated by the inclusion of article 2(2) in Part II of the Covenant, which does not protect rights as such, but rather articulates "service provisions", which outline obligations with regard to the substantive articles in Part III, it is submitted that the more benevolent approach of the CESCR should be adopted. In dealing with matters of discrimination, the Committee does not confine itself to rights explicitly laid down in the Covenant.[214] Granted, it does not view article 2(2) as autonomous in the sense of article 26 ICCPR. But, it does extend the prohibition of discrimination to ESCR, generally. The Committee's approach should be supported, as it is in the interest of the effective protection of ESCR.[215] Accordingly, article 2(2) should also be held to offer

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[212] For a discussion of the concept of discrimination in international law in relation to the right to education, see the discussion of art. 1 CDE at 6.2.2.1.2.2. *supra.* By virtue of para. 31 General Comment No. 13, see note 10, the said discussion is also relevant with regard to art. 2(2) ICESCR. See also the discussion of art. 2 CDE at 6.2.2.1.2.3. *supra.* This discussion is also relevant with regard to art. 2(2). Para. 33 General Comment No. 13 states, "In some circumstances, separate educational systems or institutions for groups defined by the categories in article 2(2) shall be deemed not to constitute a breach of the Covenant. In this regard, the Committee affirms article 2 of the UNESCO Convention against Discrimination in Education (1960)".

[213] Gebert, 1996, pp. 175–176. Own translation from original German text, ". . . Art. 2 Abs. 2 Sozialpakt nicht Diskriminierungen innerhalb des gesamten Bildungswesens schlechthin im Auge hat, sondern sich sachlich allein auf die einzelnen Teilgarantien von Art. 13 Sozialpakt bezieht".

[214] See the references to statements of CESCR members in Craven, 1995, p. 180, note 178.

[215] See also Craven, 1995, pp. 180–181.

protection against discrimination in respect of those aspects of the right to education not mentioned in article 13.

Article 2(2) mentions as grounds of discrimination: race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, and other status. A distinction on one of the stated grounds does not *per se* amount to discrimination. This will only be the case if there exists no reasonable justification for the distinction. Until this has been established, the distinction may be said to be a "suspect classification" which gives rise to a *prima facie* case of discrimination.

It may be asked whether the grounds of discrimination in article 2(2) are exhaustive or illustrative. In accordance with the exclusionary principle *expressio unius est exclusio alterius*, it would have to be held that by reason of the express enumeration of the grounds concerned, other grounds are excluded. The better view, however, is to regard the grounds in article 2(2) as merely illustrative.[216] One of the grounds mentioned is that of "other status". The term appears to have an open-ended meaning, so as to cover also other relevant grounds of discrimination. When the ICCPR was drafted, it was considered that the term "other status" in article 2(1) of that Covenant was wide enough to cover additional grounds of discrimination.[217] Also CESCR practice supports the view that the grounds in article 2(2) are not exhaustive. The Committee has, for example, considered the situation of ethnic minorities, those subscribing to alternative political philosophies, persons living in particular regional areas,[218] aliens (including stateless persons, refugees and migrant workers), unmarried couples, parents, people with AIDS, those with physical or mental disabilities,[219] the elderly[220] and homosexuals.[221] It seems that in focusing its attention on these groups, the Committee examined whether any of the groups were exposed to discrimination.

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[216] Para. 36 Limburg Principles, see note 7, states, "The grounds of discrimination mentioned in article 2(2) are not exhaustive".

[217] See UN Doc. A/2929 (1955), para. 181.

[218] See, for example, para. 35 General Comment No. 13, see note 10, which states, "Sharp disparities in spending policies that result in differing qualities of education for persons residing in different geographic locations may constitute discrimination under the Covenant".

[219] See, for example, para. 36 General Comment No. 13, see note 10, under the title "Non-discrimination and equal treatment", which states in part, "The Committee affirms paragraph 35 of its General Comment 5, which addresses the issue of persons with disabilities in the context of the right to education . . .".

[220] See, for example, para. 36 General Comment No. 13, see note 10, under the title "Non-discrimination and equal treatment", which states in part, "The Committee affirms . . . paragraphs 36–42 of its General Comment 6, which address the issue of older persons in relation to articles 13–15 of the Covenant".

[221] Generally, see the references to statements of CESCR members in Craven, 1995, pp. 169–170, notes 99–117.

It must, therefore, be concluded that in the enjoyment of the right to education under article 13, discrimination is prohibited on the grounds mentioned in article 2(2), but also on certain other grounds not mentioned in article 2(2). Seeing that Chapter 4 discussed legal instruments which provide protection against discrimination on the grounds of religion, race and sex,[222] attention will now be given to the protection against discrimination on "more intricate grounds". Presently, the grounds of nationality, language and minority status have been chosen. Only the ground of language is mentioned in article 2(2).

3.3.1. *Nationality*

Article 2(2) does not expressly mention "nationality" as a ground upon which discrimination is prohibited.[223] It must, nevertheless, be considered to be implied in article 2(2). Article 2(3) ICESCR states:

> Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognised in the present Covenant to non-nationals.

This means *e contrario* that distinctions on the ground of nationality not made by developing countries with regard to economic rights are prohibited. These amount to discrimination. Paragraph 42 Limburg Principles[224] confirms this where it emphasises that "[a]s a general rule the Covenant applies equally to nationals and non-nationals". Non-nationals are excluded from the protection against discrimination in article 2(2) only within the narrow confines of article 2(3). Article 2(3) refers to the notions of "developing countries" and "economic rights", which clearly restrict the scope of article 2(3).[225] The reference to "economic rights" means that social and cultural rights must be accorded to nationals and non-nationals equally.

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[222] See 4.4. *supra.*

[223] Art. 2(2) ICESCR does mention "national origin" as a ground upon which discrimination is prohibited. But, this does not refer to nationality in the legal sense but rather to membership of a national group. Note should be taken of art. 3(e) CDE, which obliges states parties to "give foreign nationals resident within their territory the same access to education as that given to their own nationals". On this provision, see 6.2.2.1.2.4. *supra.*

[224] See note 7.

[225] In this regard, note should be taken of paras. 43 and 44 Limburg Principles, see note 7. Para. 43 states, "The purpose of article 2(3) was to end the domination of certain economic groups of non-nationals during colonial times. In the light of this the exception in article 2(3) should be interpreted narrowly". Para. 44 states, "This narrow interpretation of article 2(3) refers in particular to the notion of economic rights and to the notion of developing countries. The latter notion refers to those countries which have gained independence and which fall within the appropriate United Nations classifications of developing countries".

Article 13 on the right to education is a cultural rather than an economic right.[226] Consequently, it must apply to nationals and non-nationals equally. This has, in fact, been confirmed by the CESCR in General Comment No. 13, at least in respect of persons of school age:

> The Committee takes note of article 2 of the Convention on the Rights of the Child and article 3(e) of the UNESCO Convention against Discrimination in Education and confirms that the principle of non-discrimination extends to all persons of school age residing in the territory of a State party, including non-nationals, and irrespective of their legal status.[227]

But, also within the group of non-nationals, discrimination is not permitted. Thus, stateless persons, refugees, migrant workers, and legal or illegal immigrants may not be treated differently, where this cannot be justified.

It may now be asked whether, and, if so, to what extent, distinctions may legitimately be made between different categories of non-nationals in the context of article 13.

It must be appreciated that certain rights of the ICESCR have a strong social connotation and, therefore, presuppose a minimal degree of social integration in a state party. These rights can thus only be exercised in a meaningful manner by persons whose normal residence is in the state party concerned. Examples would be the right to work, protected in article 6, or the right to social security, laid down in article 9. It is, accordingly, justifiable if a state party excludes non-nationals who do not normally reside in the state party from the enjoyment of these rights. In doing so, the state party only preserves its ability to effectively govern the economic, social and cultural affairs of the country. Also the right to education in article 13 can only be exercised in a meaningful manner once a certain degree of integration into society has been achieved. On this basis, non-nationals, like tourists or travelling salesmen, whose stay in a state party is of a mere temporary nature, may be wholly denied the enjoyment of the right to education. On the other hand, non-nationals, who ordinarily reside in a state party, are entitled to be treated on the same footing as nationals with regard to all aspects of article 13. This group of non-nationals includes stateless persons,[228] refugees[229] and migrant workers,[230] who have been legally

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[226] An exception is perhaps that aspect of art. 13(2)(e) ICESCR, which expects of states parties that ". . . the material conditions of teaching staff shall be continuously improved".

[227] General Comment No. 13, see note 10, para. 34.

[228] See also art. 22 Convention Relating to the Status of Stateless Persons (1954), referred to at 4.6.1. *supra.*

[229] See also art. 22 Convention Relating to the Status of Refugees (1951), referred to at 4.6.1. *supra.*

[230] See also arts. 30, 43 and 45 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990), referred to at 4.7.2. *supra.*

received in a state party, and all legal immigrants.[231] More complicated is the situation of asylum-seekers whose status is still subject to clarification, and of illegal immigrants.[232] Here it will have to be accepted that, to a greater or lesser extent, persons in this group of non-nationals are *nolens volens* integrated into the real life circumstances of their respective societies. Hence, they should also hold certain rights of access to education. At a minimum, these persons must be entitled to enjoy those aspects of article 13 which form part of the core content of the right to education.[233] First and foremost, the core content includes the right to primary education (article 13(2)(a)). The fundamental importance of primary education for a person to be successful in life even outweighs the illegal status of a child. Also lower secondary education (article 13(2)(b)), referring to the first three years of secondary education, should, for the same reason, be held to be part of the core content. Adult education which replaces primary education (article 13(2)(d)) or lower secondary education, which has not been received or completed, should, likewise, be held to be part of the core content. Other forms of adult education, and upper secondary and higher education do not constitute core elements of the right to education. But, as the CESCR's above statement demonstrates, not even upper secondary education should be refused to the group of persons concerned.[234] In the other instances, access to education may be denied. With regard to asylum-seekers, though, access may be denied only until a reasonable period to decide their status has elapsed.

It is instructive in this context to refer to a case decided by the US Supreme Court in 1982, which supports the argument in favour of access to primary and secondary education for illegal or undocumented children. In the case of *Plyler, Superintendent, Tyler Independent School District v. Doe*,[235] the Court had to rule on the constitutionality of Texan education legislation, which prevented state funds from being used for the education of undocumented children and in terms of which Local Education Agencies could deny enrolment to such children. The Court considered that the legislation violated the Equal Protection Clause of the US Constitution, since, in its view, it unfairly denied to undocumented children benefits which

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[231] See also art. 8 Declaration on the Human Rights of Individuals Who are not Nationals of the Country in Which They Live (1985), referred to at 4.7.1. *supra.*

[232] See also art. 30 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990), referred to at 4.7.2. *supra.*

[233] See Gebert, 1996, pp. 188–189. The issue of the core content of the right to education is discussed at 12.3.2.3.2.1. *infra.*

[234] Para. 34 General Comment No. 13, see note 10, refers to "all persons of school age".

[235] 457 U.S. 202 (1982).

were available to lawful residents and citizens. The Court resolved that undocumented children had the same right to attend free public education through grade 12 as lawful residents and citizens.

The Court pointed out that children rather than their parents were involved. It held that denying undocumented children access to education punished children for their parents' behaviour. Such an action, the Court argued, did not square with basic ideas of justice. The Court also mentioned that the Texan legislation imposed a lifetime hardship on a discrete class of children not accountable for their disabling status. It stated:

> The stigma of illiteracy will mark them for the rest of their lives. By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation. In determining the rationality of [the Texan legislation], we may appropriately take into account its costs to the Nation and to the innocent children who are its victims.[236]

In the light of these considerations, the Court held that the legislation concerned could only be considered rational if it furthered some substantial goal of the state. It discerned as a potential goal that the state might endeavour to protect itself from an influx of illegal immigrants and the harsh economic effects accompanying sudden shifts in population. The Court found, however, that there was no evidence to the effect that illegal immigrants imposed any significant burden on the state's economy. It found that, to the contrary, the available evidence suggested that illegal immigrants under-utilised public services, while contributing their labour to the local economy and tax money to the state fisc. The Court stated:

> The dominant incentive for illegal entry into the State of Texas is the availability of employment; few if any illegal immigrants come to this country, or presumably to the State of Texas, in order to avail themselves of a free education.[237]

The Court further found that denying undocumented children access to education constituted "a ludicrously ineffectual attempt to stem the tide of illegal immigration", particularly when compared with the alternative of prohibiting the employment of illegal immigrants.[238] The Court concluded that the Texan education legislation did not further a substantial goal of the state that warranted excluding undocumented children from free public education.[239]

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[236] *Ibidem* at 223–224.
[237] *Ibidem* at 228.
[238] *Ibidem* at 228–229.
[239] The Court also rejected as potential substantial goals of the state that undocumented

Following the *Plyler* decision, it has been suggested that undocumented children's right of access to public education entailed various procedural rights.[240] Schools should not ask about a student's immigration status. They should not treat one student differently from others on the basis of undocumented status. They should further not make inquiries of a student or parent that might expose the undocumented status of either. Schools are not entitled to contact the immigration authorities about any undocumented student. Should a school inadvertently discover the undocumented status of a student, it may not supply such information to the immigration authorities. It has also been suggested that undocumented children should enjoy certain material rights.[241] In responding to the needs of undocumented students, school staff should understand the troubled nature of immigrants' daily lives, actively provide the right of access established by *Plyler*, create a school climate that immigrant students will find hospitable, provide counselling and guidance that is responsive to the conditions of immigrant students' lives, develop policies that strengthen immigrant students' access to effective instruction, respect the languages and cultures of immigrant communities, but, at the same time, help immigrant students learn the official language, hire and train competent staff who can provide appropriate services to immigrant students, and develop strong working relationships with immigrant families.

3.3.2. *Language*

Article 2(2) read with article 13 clearly prohibits that any person be denied access to an educational institution on the basis that he speaks a certain

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children were appropriately singled out for exclusion *because* of the special burden they imposed on the state's ability to provide high-quality public education and *because* their unlawful presence within the country rendered them less likely than other children to remain within the boundaries of the state and to put their education to productive use within the state. As regards the former argument, the Court held that in terms of educational cost and need undocumented children were "basically indistinguishable" from other children. See judgement at 229. As regards the latter argument, the Court held that the state had no assurance that any child would employ the education provided by the state within the confines of the state's borders. In any event, the Court stated, the record showed that many undocumented children remained in the country indefinitely. At 230 of the judgement, the Court stated, "It is difficult to understand precisely what the State hopes to achieve by promoting the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime. It is thus clear that whatever savings might be achieved by denying these children an education, they are wholly insubstantial in light of the costs involved to these children, the State, and the Nation".

[240] See Willshire Carrera, J., *Immigrant students: Their legal right of access to public schools: A guide for advocates and educators*, Boston: National Coalition of Advocates for Students, 1989.

[241] See Willshire Carrera, J., *Educating undocumented children: A review of practices and policies*, Charleston: ERIC Clearinghouse on Rural Education and Small Schools, 1989.

language. The question, however, is whether article 2(2) read with article 13 also establishes a right to be educated in the language of one's choice. Article 13, on its own, makes no mention of language rights in education. Also a *literal* reading of articles 2(2) and 13, together, does not support the existence of a right to education in one's mother tongue. Nevertheless, international law seems to be moving beyond a strict denial of the existence of such a right.

It is useful to have a closer look at the case law which has been produced in the context of the ECHR. The ECHR, like the ICESCR, protects the right to education (more specifically, the right not to be denied education) (article 2 First Protocol ECHR) and the right to enjoy treaty rights without discrimination, *inter alia*, on the ground of language (article 14 ECHR). The European Court of Human Rights has, in two cases, commented on the issue of language rights in terms of article 2 First Protocol and article 14.

In 1968, the European Court of Human Rights delivered its judgement in the "*Belgian Linguistic Case*".[242] A proper understanding of this case requires some background information on the legal situation pertaining to language usage in education in Belgium at the relevant time. The Belgian linguistic legislation on education was based on the principle of territoriality. It divided Belgium into four linguistic regions: the Flemish, the French, the German and the Brussels region. Each region had its own language, and education had to be given in the language concerned. The exception was the region of Brussels, where the child had to visit a Flemish or French school, depending on his maternal or usual language. Parents were free to send their children to the schools of a different linguistic region or to a private school within the same region, which provided education in a language other than that of the region. Public and private schools, however, which did not give instruction in the language of the region, received no state subsidies—even if they had only one non-subsidised class teaching wholly or partially in a non-regional language. The school-leaving certificates

[242] *Case "relating to certain aspects of the laws on the use of languages in education in Belgium" (Merits)*, Judgement of 23 July 1968, Publications of the European Court of Human Rights, Series A, Vol. 6. For discussions of the case, see Suy, 1969, pp. 240–247, Wildhaber, 1969–1970, pp. 9–38, Khol, 1970, pp. 263–301, Evrigenis, 1981, p. 638, Wildhaber, 1986 (4th revision service 2000), pp. 32–38, Berger, 1987, pp. 15–20, Lonbay, 1988, pp. 535–590 and Wildhaber, 1993, pp. 537–541. The compatibility with the ECHR of the legal situation pertaining to language usage in education in the six communes of the Fourons region in Belgium formed the subject of a separate application to the former European Commission of Human Rights, which will not, however, be dealt with here. See Commission, Application No. 2209/64, *Inhabitants of Les Fourons v. Belgium*, Report 30 March 1971, 17 YBECHR 542, Committee of Ministers, Resolution DH(74)1, 30 April 1974, 17 YBECHR 614. See the discussion of this case by Nørgaard, 1981, p. 635.

of the said schools were further not recognised by the state. Only a difficult additional examination gave access to higher studies to the holders of such certificates.

In casu, the applicants were French-speaking Belgian nationals living in the Flemish region of Belgium. They complained that they wanted their children to be educated in French, but that the state did not provide any French-language education in the municipalities where they lived, that it withheld grants from all institutions in the said municipalities which failed to give instruction in Flemish and that it refused to homologate school-leaving certificates issued by such institutions. The applicants argued that, as a result, they were obliged to send their children to a school in the "Greater Brussels district" or in the "Walloon area" and that such "scholastic emigration" entailed serious risks and hardships. They contended that the state's action amounted to a violation of the rights in article 2 P-1, article 14 and article 8 ECHR.

Article 8 ECHR protects everyone's right to respect for his private and family life. The applicants alleged that article 8 implied the absence of any measure of compulsion concerning the family. Parents, therefore, had the right to choose the language in which their children should be educated. Parents had the right "to maintain the homogeneity and the integrity of the home", including "the personal, absolute and inalienable right that [their] children should resemble [them] intellectually and culturally".[243] The Court held, however, that article 8 "in no way guarantees either a right to education or a personal right of parents relating to the education of their children".[244] Its object was only "that of protecting the individual against arbitrary interference by the public authorities in his private family life".[245]

The second sentence of article 2 P-1 ECHR requires states parties, in the exercise of any functions they assume in relation to education, to respect the religious and philosophical convictions of parents. The applicants alleged that "philosophical convictions" necessarily included the cultural and linguistic preferences of the parents. The Court rejected this suggestion, however. It stated:

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[243] *Belgian Linguistic Case*, see note 242, p. 24.

[244] *Ibidem* at p. 33, para. 7.

[245] *Idem.* The Court held, though, that "it is not to be excluded that measures taken in the field of education may affect the right to respect for private and family life or derogate from it". In the opinion of the Court, "this would be the case, for instance, if their aim or result were to disturb private or family life in an unjustifiable manner, *inter alia* by separating children from their parents in an arbitrary way". See judgement at p. 33, para. 7. With regard to the facts of the case, the Court held that the legislation did not "impose" a separation, as the separation resulted from the choice of the parents who placed their children in schools situated outside the Dutch unilingual region. See judgement at p. 50, para. 7.

> This provision does not require of States that they should, in the sphere of education or teaching, respect parents' linguistic preferences, but only their religious and philosophical convictions. To interpret the terms "religious" and "philosophical" as covering linguistic preferences would amount to a distortion of their ordinary and usual meaning and to read into the Convention something which is not there.[246]

The first sentence of article 2 P-1 ECHR states that "[n]o person shall be denied the right to education". The Court pointed out that the provision did not specify the language in which education had to be conducted for the right to education to be respected. It argued, however, that "the right to education would be meaningless if it did not imply in favour of its beneficiaries, the right to be educated in the national language or in one of the national languages, as the case may be".[247] Nevertheless, there was no right to be educated in the language of one's choice.[248]

Article 14 ECHR prohibits discrimination, *inter alia*, on the ground of language, in the enjoyment of Convention rights. In the Court's view, article 14 does not entail a general right to choose the language of instruction. The Court emphasised:

> . . . Article 14, even when read in conjunction with Article 2 of the Protocol . . ., does not have the effect of guaranteeing to a child or to his parent the right to obtain instruction in a language of his choice. The object of these two Articles . . ., read in conjunction, is more limited: it is to ensure that the right to education shall be secured by each Contracting Party to everyone within its jurisdiction without discrimination on the ground, for instance, of language. This is the natural and ordinary meaning of Article 14 read in conjunction with Article 2. . . . Furthermore, to interpret the two provisions as conferring on everyone within the jurisdiction of a State a right to obtain education in the language of his own choice would lead to absurd results, for it would be open to anyone to claim any language of instruction in any of the territories of the Contracting Parties.[249]

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[246] *Belgian Linguistic Case*, see note 242, p. 32, para. 6. In this regard, the Court referred to the fact that a proposal, which had been put forward by the Danish delegation during the drafting of the ECHR, to the effect that an additional right to choose the language of instruction other than the language of the country concerned should be included in the ECHR, had been opposed on the ground that it related to the problem of minorities, which was considered outside the scope of the ECHR. See judgement at p. 32, para. 6.

[247] *Belgian Linguistic Case*, see note 242, p. 31, para. 3. "National language", as used by the Court, refers to a state's official language.

[248] The Court stated that the negative formulation of the first sentence of art. 2 P-1 ECHR indicated that "the Contracting Parties do not recognise such a right to education as would require them to establish at their own expense, or to subsidise, education of any particular type or at any particular level"—thus also not education in the language of choice. See *Belgian Linguistic Case*, see note 242, p. 31, para. 3.

[249] *Belgian Linguistic Case*, see note 242, p. 35, para. 11.

Having made these general observations, the Court proceeded to examine whether the failure to make French-language education available in the Flemish region, the withholding of grants from schools which did not give instruction in Flemish and the refusal to homologate school-leaving certificates issued by such schools, in fact, violated article 2 read with article 14, by discriminating on the ground of language.[250] According to the Court, such a conclusion could only be averted, if the state's action was objective and reasonable, that is, if it promoted a legitimate objective and if there existed a relationship of proportionality between the state's action and the objective.[251] The Court held that the various measures promoted a legitimate objective, namely, that of "[achieving] linguistic unity within the two large regions of Belgium in which a large majority of the population speaks only one of the two national languages".[252] It also found the measures to be proportionate to the stated objective. Regarding the absence of French-language education in state schools, the Court pointed out that this did not prevent French-speaking parents from sending their children to private schools teaching in French or to schools in the French unilingual region or in the Greater Brussels district.[253] Regarding the withholding of grants, it stressed that, although this was a harsh measure, it in no way affected the freedom to organise French-language private education.[254] Finally, regarding the refusal to recognise certificates, the Court emphasised that the possibility existed of taking an examination before a central board, which did not constitute "a test of excessive difficulty".[255]

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[250] The former European Commission of Human Rights had considered that, on the whole, the Belgian linguistic legislation on education was compatible with the ECHR. It had found, however, that the withholding of grants and the refusal to recognise certificates violated art. 2 P-1 read with art. 14 ECHR. See *Belgian Linguistic Case*, Report of the Commission of 24 June 1965, Publications of the European Court of Human Rights, Series B, Vol. 3.

[251] *Belgian Linguistic Case*, see note 242, p. 34, para. 10.

[252] *Ibidem* at para. 7, II. The Six Questions referred to the Court.

[253] *Idem*, II. The Six Questions referred to the Court.

[254] *Ibidem* at para. 13, II. The Six Questions referred to the Court.

[255] *Ibidem* at para. 42, II. The Six Questions referred to the Court. The European Court of Human Rights decided, however, that there was discrimination in violation of art. 2 P-1 read with art. 14 ECHR with regard to the following situation: Six communes in the "Greater Brussels district" (Drogenbos, Kraainem, Linkebeek, Rhode-St. Genèse, Wemmel and Wezembeek-Oppem) enjoyed a special status. These communes, although traditionally Flemish, had become bilingual. While the language of instruction in the communes was Flemish, children could receive education in French if this was the child's maternal language and provided further the head of the family was resident in one of the communes. The residency requirement did not apply as regards access to Flemish schools. Whereas Flemish-speaking parents living outside the communes could send their children to Flemish schools there, French-speaking parents living outside the communes could not do likewise and send their children to French schools in the communes. The Court considered this to be discriminatory, as the measure could not be said to be based on the need for unilin-

In sum, the European Court of Human Rights in the *Belgian Linguistic Case* thus decided that the principle of territoriality is basically compatible with the guarantees of the ECHR in a country with different languages in different regions. It further held that there exists a right to be educated in a national language—but no right to be educated in the language of one's choice. In the words of the Court, article 2 P-1 ECHR "contains in itself no linguistic requirement".[256]

In 1993, Luzius Wildhaber stated that "[m]ore than twenty years after the judgement in the 'Belgian Linguistic' cases, it appears somewhat too harsh to claim that the right to education 'contains in itself no linguistic requirement'".[257] He argued that new legal instruments in the field of the protection of minorities, such as the European Charter for Regional or Minority Languages of 1992, could serve to give new impetus to a more extensive interpretation of the language aspects of the right to education under article 2 P-1 ECHR.[258] Wildhaber considers language to be so intimately connected with education that it must remain conceivable that the state's denial of education in a certain language may violate the right to education. In particular, he maintains that it remains open whether a failure to offer education in a language which is spoken by the nationals of a state, but which is not defined as a national language, should not be considered as a violation of article 2.[259]

The latest case law of the European Court of Human Rights appears to interpret the language aspects of the right to education under article 2 P-1 ECHR in the suggested wide manner. On 10 May 2001, the Court delivered its judgement in the case of *Cyprus v. Turkey*.[260] This case must be understood in the light of the following facts: Of the inhabitants of Cyprus, about 85% are Greek-speaking and 15% Turkish-speaking. Greek Cypriots live mainly in the south of Cyprus, Turkish Cypriots mainly in the north. From 1974 onwards, Turkish forces have been occupying the northern part of Cyprus, where they have set up a separate administration. Cyprus is today factually divided into the (southern) Republic of Cyprus and a (non-recognised) "Turkish Republic of Northern Cyprus". Whereas Greek and Turkish are the official languages of the south, Turkish is the official language of the north.

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gual territorial homogeneity. See *Belgian Linguistic Case*, see note 242, paras. 26–32, II. The Six Questions referred to the Court.

[256] *Belgian Linguistic Case*, see note 242, p. 42, para. 7.

[257] Wildhaber, 1993, p. 541.

[258] Wildhaber, 1986/2000, pp. 37–38, para. 135.

[259] Wildhaber, 1993, p. 541.

[260] *Cyprus v. Turkey*, European Court of Human Rights (Grand Chamber), Judgement of 10 May 2001, Reports of Judgements and Decisions 2001–IV.

In casu, the applicant state requested the Court to declare that the respondent state was responsible for violations of various provisions of the ECHR, including article 2 P-1 ECHR. The Turkish-Cypriot authorities had abolished the secondary schools which were formerly available to the children of Greek Cypriots and which had offered instruction in the Greek language. The consequence was that, on completion of primary education, Greek-Cypriot parents, if they did not wish to send their children to a Turkish or English-language school in the north, had to arrange for their children to transfer to schools in the south. This was not an easy decision to make, as severe restrictions attached to the return of the children concerned, once they had completed their secondary education in the south. The vast majority of children went to the south for their secondary education. The restrictions on their return to the north had led to the separation of many Greek-Cypriot families.

The Court admitted that it was open to children, on reaching the age of twelve, to continue their education at a Turkish or English-language school in the north. In the strict sense, the Court argued, there was, accordingly, no denial of the right to education under the first sentence of article 2 P-1 ECHR. The Court also referred to the *Belgian Linguistic Case*, which had stated that the provision did not specify the language in which education had to be conducted for the right to education to be respected.[261] The Court, nevertheless, held:

> . . . [T]he option available to Greek-Cypriot parents to continue their children's education in the north is unrealistic in view of the fact that the children in question have already received their primary education in a Greek-Cypriot school there. The authorities must no doubt be aware that it is the wish of Greek-Cypriot parents that the schooling of their children be completed through the medium of the Greek language. Having assumed responsibility for the provision of Greek-language primary schooling, the failure of the ["Turkish Republic of Northern Cyprus"] authorities to make continuing provision for it at the secondary-school level must be considered in effect to be a denial of the substance of the right at issue. It cannot be maintained that the provision of secondary education in the south in keeping with the linguistic tradition of the enclaved Greek Cypriots suffices to fulfil the obligation laid down in Article 2 of Protocol No. 1, having regard to the impact of that option on family life. . . .[262]

It must be conceded that the Court did not find that article 2 P-1 ECHR conferred a right to be educated in the language of one's choice. The Court decided, however, that there was a right to education in Greek, although the latter does not enjoy the status of a national language in

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[261] *Cyprus v. Turkey*, para. 277.
[262] *Ibidem* at para. 278.

Northern Cyprus. It argued that because primary education had been provided in Greek, there was a right that secondary education also be conducted in Greek, as otherwise "the substance" of the right to education would be denied. This recognises that educational rights cannot be "neatly" separated from the language issue, as has been suggested in the *Belgian Linguistic Case*. What the Court appears to be saying is that, in certain circumstances, the failure to provide education in the mother tongue may, in fact, violate the right to education!

It is submitted that the approach of the European Court of Human Rights in *Cyprus v. Turkey*, in terms of which the right to education is recognised to have a linguistic component, should also guide the interpretation of article 2(2) ICESCR read with article 13 ICESCR. These provisions should be construed widely, as also protecting the right to be educated in the mother tongue in appropriate circumstances. The CESCR appears to be following this approach already. The Committee thus expressed its concern, when discussing the situation of ESCR in Mauritius, that Kreol and Bhojpuri, the only languages spoken by the large majority of the population, were not used in the education system.[263] In other words, the Committee suggested that the Mauritian population had a right to receive education in the mother tongue.[264]

3.3.3. *Vulnerable and Disadvantaged Groups in Society: The Case of Minorities*

It has been stated that the grounds of discrimination in article 2(2) are not exhaustive. Article 2(2) mentions "other status" as a ground of discrimination. The CESCR considers "other status" to include a group of motives for discrimination, which have in common that certain groups in society have a status of particular social vulnerability or disadvantagement. Particularly vulnerable and disadvantaged groups are normally not exposed to "active", but rather to "static" discrimination. Usually they enjoy equal treatment in terms of the law. However, when compared with other groups in society, their socio-economic "starting positions" are unfavourable. Accordingly, they do not enjoy equal opportunities in the exercise of ICESCR rights. Question 5(b) on article 13 of the CESCR guidelines regarding state reports, enquiring on the practical enjoyment of the right to education at the various levels of the education system, identifies as particularly vulnerable and

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[263] Concluding Observations of the CESCR: Mauritius (without report), 10th Session, reproduced in UN Doc. E/1995/22, para. 181.

[264] For the CESCR's approach concerning language rights in education, see the discussion at 11.2.2.5., 11.2.2.6. and 11.2.2.7. *infra*. At 12.3.2.3.2.1. *infra*, it will be argued that education in the language of one's own choice in appropriate circumstances forms part of the core content of the right to education.

disadvantaged groups: young girls, children of low-income groups, children in rural areas, children who are physically or mentally disabled, children of immigrants and of migrant workers, children belonging to linguistic, racial, religious or other minorities, and children of indigenous people.

The space available does not allow for a discussion of the equal enjoyment of the right to education by all of these groups. Instead, the following discussion will focus on one group whose right to equal opportunities in the educational sphere has in the past often been polemically debated. The reference here is to linguistic, racial, religious or other minorities.

3.3.3.1. *Discrimination on the ground of minority status*

Article 2(2) does not mention "association with a minority group" as a ground upon which discrimination is prohibited.[265] Nevertheless, article 2(2) should also be held to protect persons belonging to minority groups against discrimination. Persons belonging to minority groups are persons with "other status".[266]

Article 2(2) read with article 13 thus clearly prohibits that any person be denied access to an educational institution on the basis that he is associated with a certain minority group. Members of minority groups are granted the right to ensure the religious and moral education of their children in conformity with their own convictions (article 2(2) read with article 13(3)). They are granted the right to establish and direct educational institutions (article 2(2) read with article 13(4)). States parties to the ICESCR must further not, when developing "a system of schools at all levels", neglect those areas inhabited by minority groups (article 2(2) read with article 13(2)(e)).[267] When realising the right to education at the various levels, states parties would have to ensure that the measures they take equally benefit minority groups—in fact, they would have to implement special positive programmes to promote equal opportunities for minority groups in the education system (article 2(2) read with article 13(2)).

3.3.3.2. *Does article 13 ICESCR read with article 2(2) ICESCR protect special minority education rights?*

The question may be asked whether article 13, which makes no mention of minority education rights, if read with article 2(2), protects certain rights

[265] Art. 14 ECHR mentions "association with a national minority" as a ground upon which discrimination is prohibited.

[266] See Gebert, 1996, p. 196.

[267] Para. 35 General Comment No. 13, see note 10, states, "Sharp disparities in spending policies that result in differing qualities of education for persons residing in different geographic locations may constitute discrimination under the Covenant".

particularly aimed at satisfying minority educational needs—notably, the right of access to education in the minority language.

First of all, is there a right to run private schools which teach through the medium of the minority language? It has been pointed out that article 13(4) also protects the right of members of minority groups to establish and direct private educational institutions. Surely such private schools may teach the minority language as a subject, as curricular deviations *vis-à-vis* state schools of the nature contemplated constitute the very essence of the right to found private schools. But, may these schools also teach in the minority language? The provisions of international instruments, like article 5(1)(c) CDE, usually recognise the right of members of minorities to use *or* to teach in their own language, depending on the educational policy of the state. This provision would seem to imply that the state may deny the use of a minority language as language of instruction, in the interest of furthering goals, such as ensuring that everyone masters the national language. If this is, in fact, the implication of the provision, this points to a rather weak protection of minority language rights in the context of private education.

Next, is there a right to public education in the minority language? Pius Gebert believes that one cannot deduce from article 13 read with article 2(2) a right to instruction in the minority language in state schools.[268] He argues:

> If, however, a minority cannot use its language in public schools as language of instruction, this, strictly speaking, does not amount to a limitation of the right to education, but to a restriction of cultural self-development. This is so because the use of the mother tongue as language of instruction should in the first instance contribute to minorities preserving their linguistic *identity* as a group and thus enable them to survive. The use of the own language, therefore, constitutes a fundamental element of the protection of minorities. But, the Covenant contains no guarantee aimed at the protection of minorities, the goal of which is the strengthening of the identity and the self-development of minorities; it only wants to ensure that minorities are not restricted in the exercise of the right to education.[269]

The core of the argument is that education in the minority language in public schools is a matter of minority rights, more specifically, minority

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[268] See Gebert, 1996, pp. 197–199.

[269] *Ibidem* at p. 198. Own translation from original German text, "Kann aber eine Minderheit ihre Sprache in öffentlichen Schulen nicht als Unterrichtssprache benützen, bedeutet dies strenggenommen keine Einschränkung des Rechts auf Bildung, sondern eine Beschränkung der kulturellen Selbstentfaltung. Denn der Gebrauch der Muttersprache als Unterrichtssprache soll in erster Linie dazu beitragen, dass Minderheiten ihre sprachliche *Identität* als Gruppe bewahren und so überleben können. Der Gebrauch der eigenen Sprache bildet deshalb ein wesentliches Element des Minderheitenschutzes. Der Sozialpakt enthält aber keine Minderheitenschutzgarantie, deren Ziel die Identitätsstärkung und Selbstentfaltung von Minderheiten bildet; er will lediglich sicherstellen, dass Minderheiten bei der Ausübung des Rechts auf Bildung nicht beeinträchtigt werden".

rights related to language usage, but not a matter of the right to education, and that the ICESCR does not specifically protect minority rights. With due respect, this writer cannot quite agree with this view. The fundamental question that needs to be answered is whether minority education rights should be considered as a species of minority cultural right or a species of education right. The final interpretation of the rights depends on this determination. Holly Cullen holds that the latter path allows for a fuller solution of minority educational issues.[270] He argues that if minority education rights are seen primarily as part of minority rights, the emphasis is placed on the protection of minority identity, possibly at the expense of education directed at development of a child's potential. If, however, minority education rights are seen as part of the right to education, a greater emphasis is placed on the fulfilment of the child's potential.[271] But, he also adds:

> Nonetheless, analysing minority education rights as part of the right to education would not require the abandonment of the pluralism value. Minority education rights do not merely involve giving minorities the same levels of education as are provided for the majority. For minorities, adequate education includes respect for, and promotion of, their distinctiveness, as well as the development of individual talents and skills. This entails that the individual right to education must be understood against the background of the collective right to maintain minority identity. Minority education rights, as a result, involve the maximisation of both equality of opportunity and pluralism.[272]

This construction of minority education rights should be fully supported. In terms thereof, the matter of public education in the minority language is, in fact, a question pertaining to the right to education.

In the absence of any reference to minority education rights in article 13, it is *prima facie* difficult to read any such rights into the ICESCR. But, once it is accepted that minority education rights are part of the right to education, it must also be held that their protection is embedded in article 13. A reading of article 13 with article 2(2) might then well give rise to the idea of special education rights for minority groups, which are geared towards satisfying their particular educational needs, and intended to accomplish true equality of opportunity for them. This could cover the right to instruction in the minority language in state schools.

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[270] See Cullen, 1993, pp. 143–177, particularly at pp. 143–144.
[271] See *ibidem* at p. 144.
[272] *Idem.*

3.3.3.3. *Identifying the special minority education rights protected by international law, to guide the interpretation of article 13 ICESCR read with article 2(2) ICESCR*

If, as has been argued above, article 13 read with article 2(2) also protects special minority education rights, the question arises, which rights does this, in fact, cover? It is necessary to analyse international law as it pertains to minority education rights to answer this question. The special minority education rights which are protected by international law should guide future interpretations of article 13 read with article 2(2). Accordingly, the discussion which follows will attempt to identify the special minority education rights which are protected by international law.

First of all, the protection of minority education rights will be considered in the historical context of the minority treaties concluded after the First World War. Thereafter, the provisions of the OSCE's *Hague Recommendations Regarding the Education Rights of National Minorities* of 1996 will be discussed. Finally, a few words will be said on the education rights of minorities in the matter of religion, this element not having been dealt with in the Hague Recommendations.

3.3.3.3.1. *The protection of minority education rights under the minority treaties concluded after the First World War*

The modern protection of minority rights began with the minority treaties, concluded after the First World War under the auspices of the League of Nations.[273] The said treaties between the Allied Powers, on the one hand, and new or territorially enlarged states, on the other, contained important provisions concerning the protection of racial, religious and linguistic minorities. Underlying the treaties were two general principles: For one, the treaties laid down the principle of non-discrimination. Members of minorities and of the majority of the population were to be treated equally. This may be described as the idea of "equality in law". For the other, the treaties defined special measures to promote the protection of members of minorities. These were intended to achieve effective equality for members of minorities with other citizens of the state. This may be described as the idea of "equality in fact".[274]

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[273] For a discussion of the protection of minorities in the period between the two World Wars, see McKean, W., *Equality and Discrimination under International Law*, Oxford: Clarendon Press, 1983, chapters 1 and 2. There was at the disposal of members of minorities a procedure of petitions to the League of Nations. See Stone, J., "Legal nature of the minorities petition", in: *British Yearbook of International Law*, Vol. 12, 1931, pp. 76 *et seqq*.

[274] In this sense, see Azcárate, 1945, pp. 59–60, Claude, 1955/1969, pp. 18–19 and Capotorti, 1979, paras. 99–100. See also Coomans, 1992, p. 132.

The treaties contained extensive provisions on the issue of minority education.[275] They all protected the equal right of members of minorities to found private schools at their own expense. The state had to assure to members of minorities the right to use their own language and to exercise their religion in such schools.[276] This reflected the idea of "equality in law". Furthermore, the state was obliged, in the areas where the minorities lived, to provide public primary education in the minority language. This did not prevent the state, however, from making the teaching of the national language compulsory in public schools. The state was, moreover, expected to contribute financially to the realisation of educational facilities for minorities.[277] All of the above reflected special rights intended to realise "equality in fact" for minorities with the majority of the population. The various state obligations are typically borne out by articles 8 and 9 of the Treaty between the Principal Allied and Associated Powers and Poland signed on 28 June 1919.[278] Article 8 of the Treaty stated:

> Polish nationals who belong to racial, religious or linguistic minorities shall enjoy the same treatment and security in law and in fact as the other Polish nationals. In particular they shall have an equal right to establish, manage and control at their own expense charitable, religious and social institutions, schools and other educational establishments, with the right to use their own language and to exercise their religion freely therein.

Article 9 stated:

> Poland will provide in the public educational system in towns and districts in which a considerable proportion of Polish nationals of other than Polish speech are residents adequate facilities for ensuring that in the primary schools the instruction shall be given to children of such Polish nationals through the medium of their own language. This provision shall not prevent the Polish Government from making the teaching of the Polish language obligatory in the said schools.
>
> In towns and districts where there is a considerable proportion of Polish nationals belonging to racial, religious or linguistic minorities, these minorities shall be assured an equitable share in the enjoyment and application of the sums which may be provided out of public funds under the State, municipal or other budget, for educational, religious or charitable purposes. . . .

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[275] For a discussion of the protection of education rights in the post-World War I minority treaties, see Lonbay, 1988, pp. 75–134.

[276] See the publication of the League of Nations, *The League of Nations and the Protection of Minorities of Race, Language and Religion*, Geneva, 1927, p. 22. See also Coomans, 1992, p. 132.

[277] See the publication of the League of Nations, see note 276, p. 23. See also Coomans, 1992, p. 132.

[278] 112 Great Britain Treaty Series 232. For comments on the provisions on education of the Treaty between the Principal Allied and Associated Powers and Poland, see Lonbay, 1988, pp. 82–85.

The most elaborate provisions on minority education were those of the Germano-Polish Convention relating to Upper Silesia signed on 15 May 1922.[279] Chapter Four of Division 2 of Part 3 (articles 97–133) dealt with the education rights of members of minorities in the territory of Upper Silesia, divided between Germany and Poland.

The first section of Chapter 4 (articles 97–104) addressed *private education*. Article 98(1) protected the right of nationals belonging to minorities to establish, manage, supervise and maintain at their own expense private schools or private educational establishments. Article 98(2) authorised private instruction outside of school by teachers or private tutors or by the parents. In terms of article 99(1), the official language could not be imposed as language of instruction in the private schools of a language minority or in private instruction. In certain circumstances, however, it could be imposed as a subject of the curriculum.[280] Article 102 stressed that the state retained its powers of supervision with regard to private education. The state was competent to decide whether or not private education was "sufficient" to take the place of public education.[281] Article 128 provided that, if the education given in private minority schools corresponded to that of public schools, the state was required to recognise the school-leaving certificates of private schools as being of the same value as those issued by public schools.

The second section of Chapter 4 (articles 105–114) addressed *public primary education*. In this context, article 105(2) distinguished between:

- minority schools, *i.e.* primary schools which used the language of the minority as language of instruction;
- minority classes, *i.e.* primary classes, in primary schools of the official language, which used the language of the minority as language of instruction; and
- minority language and minority religious courses, *i.e.* courses entailing instruction of the minority language and religious instruction in the minority language, respectively.

A minority school had to be established following the application by a national supported by the persons legally responsible for the education of

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[279] The Germano-Polish Convention relating to Upper Silesia was deemed to have been placed in the League of Nations Treaty Series, Vol. IX. It was, in fact, circulated. See Doc. C.396.M.243 of 9 June 1922. The text of the Convention is reproduced in the French version in Triepel, H. (ed.), *Nouveau Recueil Général de Traités* (. . .), Leipzig: Librairie Theodor Weicher, Third Series, Volume XVI, 1927, pp. 645–875. The text of the Convention will not be reproduced in this book. For a discussion of the provisions on education of the Convention, see Lonbay, 1988, pp. 86–125.

[280] Art. 99(2) Convention relating to Upper Silesia.

[281] Art. 103(2) Convention relating to Upper Silesia.

at least forty children of a language minority.[282] If at least forty of these children belonged to the same confession or religion, a minority school of confessional or religious character had to be established on demand.[283] Where the establishment of a minority school was not expedient for special reasons, minority classes had to be established.[284] Similarly, minority language courses had to be provided following the application by a national supported by the persons legally responsible for the education of at least eighteen pupils of a primary school, of a language minority.[285] If at least twelve of these pupils belonged to the same confession or religion, minority religious courses had to be provided on demand.[286] The maintenance of minority educational facilities had to take place conforming to the same principles applicable to the maintenance of other public primary schools.[287] For every minority school as well as for the minority classes, a school board had to be constituted. More than half of the members of the board had to be elected by the persons legally responsible for the education of the pupils in the school or classes concerned.[288] School boards were to participate in the administrative work of schools and classes. In particular, this concerned school premises and school materials. They could take part in decisions concerning the use of the sums attributed to minority educational institutions. School boards were also entitled to express their view concerning the appointment of teachers.[289]

The fourth section of Chapter 4 (articles 116–130) addressed *secondary and higher education*. As in the case of primary education, article 117 distinguished between minority schools, minority classes and minority language and minority religious courses as part of the secondary and higher public education system. The state was obliged to provide such facilities—however, more pupils were required before they had to be set up.[290] Article 125 provided for representation in educational boards.

Note should further be taken of article 133 in the fifth section of Chapter 4, which contained general dispositions. Article 133 had stated:

> 1. The Contracting Parties undertake not to authorise in any school in their respective parts of the plebiscite territory the use of books or pictorial teaching material liable to offend the national or religious sentiments of a minority.

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[282] Art. 106(1) Convention relating to Upper Silesia.
[283] Art. 106(2) Convention relating to Upper Silesia.
[284] Art. 106(3) Convention relating to Upper Silesia.
[285] Art. 107(1) Convention relating to Upper Silesia.
[286] Art. 107(2) Convention relating to Upper Silesia.
[287] Arts. 109 and 110 Convention relating to Upper Silesia.
[288] Art. 111 Convention relating to Upper Silesia.
[289] Art. 112 Convention relating to Upper Silesia.
[290] Arts. 118 and 121(2) Convention relating to Upper Silesia.

> 2. Likewise, each of the Contracting States shall take the necessary measures to ensure that, in the lessons given at school, the national and cultural qualities of the other Party are not improperly deprecated in the eyes of the pupils.[291]

Article 133 only negatively obliged the contracting states. Nevertheless, the article may be seen as a precursor of those provisions of modern texts on minority rights which positively require states to further among the majority a knowledge of the minorities of the state.

In the period between the two World Wars, the Permanent Court of International Justice was approached on several occasions in connection with minority issues. Generally, the cases required the Court to interpret provisions of the minority treaties. Also the education rights of minorities were analysed by the Court.

In the *Rights of Minorities in Upper Silesia (Minority Schools)*[292] and *Access to German Minority Schools in Upper Silesia Cases*,[293] the Court was called upon to clarify certain aspects of the Convention relating to Upper Silesia. The effect of the Court's jurisprudence was to confirm the right of parents to choose which school, whatever the language of instruction, their children should attend, although such choice was not unlimited.[294] The Upper Silesia Convention, in article 131, provided that eligibility for minority schools would be determined by means of a verbal or written declaration, made by the head of the family, as to mother tongue. The declaration was decisive and tests to verify it were forbidden. When subsequently in the Polish part of Upper Silesia many Polish parents on the basis of the declaration sent their children to German schools, Poland argued that declarations had to be based on objective facts.[295] The Permanent Court of International Justice, in the *Rights of Minorities Case*, agreed with this view. The Court stated that

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[291] This author's translation.

[292] Permanent Court of International Justice, Judgement in *Rights of Minorities in Upper Silesia (Minority Schools)*, Germany v. Poland, 26 April 1928, Judgement No. 12, Series A, No. 15. Text in: Hudson World Court Reports, Vol. 2, 1935, pp. 268–319. For a discussion of the case, see Lonbay, 1988, pp. 106–118.

[293] Permanent Court of International Justice, Advisory Opinion in *Access to German Minority Schools in Upper Silesia*, 15 May 1931, Advisory Opinion No. 19, Series A/B, No. 40. Text in: Hudson World Court Reports, Vol. 2, 1935, pp. 690–710. For a discussion of the case, see Lonbay, 1988, pp. 106–118.

[294] See Cullen, 1993, p. 172.

[295] In 1926, the Polish authorities had deleted the names of over 7000 pupils who had been entered for minority schools, arguing that the declarations involved did not reflect the true position as to mother language.

> the right freely to declare what is the language of a pupil or child . . . does not constitute an unrestricted right to choose the language in which instruction is to be imparted or the corresponding school.[296]

The Court thus weakened the choice principle. It did so, despite the fact that article 74 (and article 131) of the Upper Silesia Convention prohibited verification of declarations. When Poland, in response to the Court's judgement, introduced language testing for children whose declarations were doubted, the Court, in the *Access to German Minority Schools Case*, enforced the choice principle.[297] It held that the guarantee that declarations would not be verified had been violated by the language testing. The combined effect of the two cases, therefore, was that, ultimately, parents were free to determine whether their children received education in Polish or German. They were well advised, however, not to choose education in a language of which the child had insufficient command.

The Permanent Court of International Justice further extensively dealt with minority education rights in the case of *Minority Schools in Albania*.[298] The facts in this case were as follows: On admission to the League of Nations, Albania had made a unilateral declaration, in terms of which it assumed various duties relating to minorities. Article 5(1) of the Albanian Declaration for the Protection of Minorities of 2 October 1921 stated:

> Albanian nationals who belong to racial, religious or linguistic minorities will enjoy the same treatment and security in law and fact as other Albanian nationals. In particular they shall have an equal right to maintain, manage and control at their own expense or to establish in the future, charitable, religious and social institutions, schools and other educational establishments, with the right to use their own language and to exercise their religion freely therein.[299]

In 1933, however, Albania amended its Constitution. Amongst others, the amendment entailed the abolition of all forms of private education.[300] The Greek minority in Albania thereupon submitted petitions to the Council of the League of Nations, claiming that the amendment violated article 5(1)

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[296] See at para. 2 of the Court's judgement.

[297] The case had arisen from a declaration that patently had not accorded with the factual linguistic ability of the child.

[298] Permanent Court of International Justice, Advisory Opinion in *Minority Schools in Albania*, 6 April 1935, Advisory Opinion No. 40, Series A/B, No. 64. Text in: Hudson World Court Reports, Vol. 3, 1938, pp. 484–512. For a discussion of the case, see Lonbay, 1988, pp. 106–118 and Coomans, 1992, pp. 133–135.

[299] Text in Hudson, see note 298, p. 511.

[300] The relevant article in the amended Constitution of 1933 thus stated, "The instruction and education of Albanian subjects are reserved to the State and will be given in State schools. Primary education is compulsory for all Albanian nationals and will be given free of charge. Private schools of all categories at present in operation will be closed". Text in Hudson, see note 298, p. 493.

of the Albanian Declaration. In its opinion, the purpose of article 5 was to ensure an effective equality for minorities in matters of education. It maintained that the freedom to found private schools was indispensable to guarantee such equality. It held that the abolition of this freedom, accordingly, factually discriminated against minorities.[301] The Albanian government contended, however, that article 5(1) merely sought to grant to minorities, in matters of education, rights equal to those possessed by the majority. The abolition of private schools, in its view, was not discriminatory, since it was applicable to the majority and the minority alike.[302] The Council of the League of Nations requested the Permanent Court of International Justice to give an advisory opinion on the issue.

The Court rejected the Albanian government's line of reasoning. The Court held that the idea underlying the treaties for the protection of minorities

> is to secure for certain elements incorporated in a State, the population of which differs from them in race, language or religion, the possibility of living peaceably alongside that population and co-operating amicably with it, while at the same time preserving the characteristics which distinguish them from the majority, and satisfying the ensuing special needs.[303]

The Court continued by stating that two things were necessary to attain this object:

> The first is to ensure that nationals belonging to racial, religious or linguistic minorities shall be placed in every respect on a footing of perfect equality with the other nationals of the State.
>
> The second is to ensure for the minority elements suitable means for the preservation of their racial peculiarities, their traditions and their national characteristics.[304]

In the discussion above, the first aspect has been held to be directed at implementing "equality in law", the second at realising "equality in fact". The former has in mind equal treatment in a formal sense. The latter envisages special treatment for minorities to attain what the Court described as "an effective, genuine equality".[305] The Court summarised this as follows:

> Equality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations.[306]

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[301] Text in Hudson, see note 298, p. 495.
[302] *Ibidem* at pp. 494–495.
[303] *Ibidem* at p. 496.
[304] *Idem*.
[305] *Ibidem* at p. 498.
[306] *Idem*.

In the opinion of the Court, the freedom to found own institutions constituted a necessary precondition for the achievement of "equality in fact":

> [T]here would be no true equality between a majority and a minority if the latter were deprived of its own institutions, and were consequently compelled to renounce that which constitutes the very essence of its being as a minority.[307]

As it were, the Court considered the right to establish own institutions, such as minority private schools, as a form of different or special treatment, crucial to the attainment of "an equilibrium between different situations":

> For the institutions mentioned in the second sentence [of article 5] are indispensable to enable the minority to enjoy the same treatment as the majority, not only in law but also in fact. The abolition of these institutions, which alone can satisfy the special requirements of the minority groups, and their replacement by government institutions, would destroy this equality of treatment, for its effect would be to deprive the minority of the institutions appropriate to its needs, whereas the majority would continue to have them supplied in the institutions created by the State.
>
> Far from creating a privilege in favour of the minority, as the Albanian Government avers, this stipulation ensures that the majority shall not be given a privileged situation as compared with the minority.[308]

The Court concluded, therefore, that the abolition of private education by Albania, although it did not discriminate against the Greek minority in a legal sense, it did so factually. The Court thus agreed with the arguments advanced by the Greek minority.

The post-World War I minority arrangements were not in the first instance premised on humanitarian considerations. The major rationale of the minority regimes was to help the defeated countries reconcile themselves to the loss of territory in the light of the knowledge that the minorities there would be protected.[309] The minorities system also did not work well, as there was a general lack of goodwill on the part of the states involved.[310] This notwithstanding, it cannot be denied that the minority treaties had laid down extensive guarantees for minorities. In the field of education, the treaties had provided for:

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[307] *Ibidem* at p. 496.

[308] *Ibidem* at p. 499.

[309] Azcárate, 1945, p. 14 considered the protection of minorities under the minority treaties not to have had a humanitarian, but a political aim.

[310] McCartney stated in Luard, E. (ed.), *The International Protection of Human Rights*, London: Thames & Hudson, 1967, p. 33, "The system of protection of minorities through the League enjoyed only a few years of life, and it would be hypocritical to pretend that it proved effective even during those years".

- the right not to be discriminated against and the right to special measures to ensure effective equality;
- the right to establish private schools at one's own expense, subject to state supervision;
- the right to the teaching of and instruction in the minority language in private and public schools—in the case of public educational institutions, instruction in the minority language could sometimes be claimed up to the level of higher education; the official language also had to be taught as a subject, however;
- the right to participate in the running of minority schools; and
- the prohibition of advocating hatred for minorities in the schools of the majority.

After the Second World War, the newly established United Nations Organisation placed a rather low priority on the protection of minorities. The consideration was that it was unnecessary to protect minority rights if the human rights of all people were protected. Only fairly recently have efforts been resumed to protect minority rights at a similarly high level as at the time of the League of Nations, notably in the context of the CSCE/OSCE.

3.3.3.3.2. *The OSCE's Hague Recommendations Regarding the Education Rights of National Minorities*

In Chapters 4, 5 and 6, various instruments have been mentioned, which address the rights of members of minorities. Notably, reference has been made to article 27 ICCPR, article 30 CRC, article 5(1)(c) CDE, the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, the Framework Convention for the Protection of National Minorities, the European Charter for Regional or Minority Languages and Part IV Concluding Document of the Copenhagen Conference on the Human Dimension of the CSCE. Rather than repeating the discussion of the provisions of the instruments which concern minority education rights, the focus in what follows will be on the OSCE's *Hague Recommendations Regarding the Education Rights of National Minorities* of 1996.[311] This approach is justified as the said Recommendations largely consolidate

[311] The Hague Recommendations have been published as *The Hague Recommendations Regarding the Education Rights of National Minorities & Explanatory Note*, The Hague: Foundation on Inter-Ethnic Relations, 1996. For further details on the Hague Recommendations, see Eide, 1996–1997, pp. 163–170 and Siemienski and Packer, 1996–1997, pp. 187–198. Take note also of the following two working papers prepared for the Working Group on Minorities, a subsidiary body of the UN Sub-Commission on the Promotion and Protection of Human Rights: Siemienski, 1997 (UN Doc. E/CN.4/Sub.2/AC.5/1997/WP.3) and Mehedi, 1999a (UN Doc. E/CN.4/Sub.2/AC.5/1999/WP.5).

international legal obligations relating to minority education in a single document.

The outbreak of conflict between ethnic communities in a state often results from the perception of the minority that its survival as a viable community with its own identity, culture and language is at risk. Often this is the case where the minority feels that its linguistic and cultural survival and development through education is threatened. It has been stated above[312] that the Helsinki Document of the CSCE of 1992 establishes the position of a High Commissioner on National Minorities (HCNM), whose task it is to provide "early warning" and, as appropriate, "early action" with regard to tensions involving minority issues that have the potential to develop into a conflict within the CSCE area. On several occasions, the HCNM has had to deal with issues related to minority education rights to prevent the emergence of inter-ethnic conflict between majority and minority communities. In many instances, the HCNM directed recommendations to the states concerned, referring to the educational priorities of minority communities.[313] The HCNM soon realised, that it would be useful to request a number of experts to develop a series of general policy guidelines on the basis of which issues of minority education could be resolved. In the end, this led to the formulation of the Hague Recommendations Regarding the Education Rights of National Minorities. The Hague Recommendations are based on existing human rights instruments. They are not an attempt at setting new standards.[314] In the words of Asbjørn Eide, "The main function of *The Hague Recommendations* is to develop [the] rather general and sometimes vague elements of international law into more precise and detailed provisions which can guide educational policies better than the rather general international standards on which they are based".[315]

Sometimes it appears as if the Hague Recommendations confer wider rights than are accorded in terms of existing international law on minority education. For example, the Hague Recommendations call upon states to create opportunities for the study of *and* instruction in minority lan-

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[312] See 5.2.3. *supra*.

[313] The HCNM has, for example, made recommendations concerning the educational rights of the Greek minority in Albania, the Albanian minority in Macedonia, the Slovak minority in Hungary, the Hungarian minority in Slovakia and the Hungarian minority in Romania. The various recommendations are available on the website of the OSCE (www.osce.org). To mention a recent example of recommendations, in a letter dated 12 January 2001 addressed to the Russian Federation, the HCNM finds that, considering the size of the Ukrainian minority in Russia, the number of Ukrainian language courses and of Ukrainian language schools and classes to be small. He recommends that the number of Ukrainian children getting a Ukrainian language education could be increased by setting up Ukrainian language classes in Russian schools.

[314] See Siemienski and Packer, 1996–1997, p. 191.

[315] Eide, 1996–1997, p. 165.

guages, whereas most international texts oblige states to create opportunities for the study of *or* instruction in minority languages. Nevertheless, also these instances must be seen as interpretations of existing standards:

> The reason for such a general formulation [of existing standards on minority rights] is that minority rights provisions must be as inclusive and as universal as possible. They must be relevant to all States which decide to adhere to them. At the same time they must be seen by the States as realistic. Conditions within States differ such that States must be given the necessary flexibility to adapt the implementation of the provisions to their reality. . . . An open-ended "either/or" type of provision could leave the door open to a "minimalistic" approach on the part of public authorities. This may be true. However, when they adhere to human rights instruments, States are expected by the international community—to act in good faith when implementing the provisions and to use the standards as a minimum from which more should be sought to be achieved.[316]

The same idea is reflected in Recommendation 3 Hague Recommendations, which states:

> It should be borne in mind that the relevant international obligations and commitments constitute international minimum standards. It would be contrary to their spirit and intent to interpret these obligations and commitments in a restrictive manner.

The following major thrusts of the Hague Recommendations may be identified:

- integration;
- non-discrimination and equality;
- participation and decentralisation;
- alternative education;
- interculturalism; and
- multilingualism.

Each of these will now be addressed.

Integration

The Hague Recommendations attempt to strike a balance in the field of minority education rights between the obligations of the state with regard to members of minorities and the obligations of this particular group of persons to the state. Recommendation 1 thus recognises that "[t]he right of persons belonging to national minorities to maintain their identity can only be fully realised if they acquire a proper knowledge of their mother

[316] Siemienski, 1997 (UN Doc. E/CN.4/Sub.2/AC.5/1997/WP.3), see under the heading "The need for policy guidelines".

tongue during the educational process". This clearly obliges the state to ensure that members of minorities can actually acquire the said knowledge of their mother tongue. But, Recommendation 1 also recognises that "persons belonging to national minorities have a responsibility to integrate into the wider national society through the acquisition of a proper knowledge of the State language". Members of minorities must, hence, learn the official language of the state, learn about the state and be able to function fully as citizens of the state. The fundamental objective of the Hague Recommendations is, therefore, that of "equality and freedom through integration".[317]

Non-discrimination and equality

In terms of Recommendation 2, "[i]n applying international instruments which may benefit persons belonging to national minorities, States should consistently adhere to the fundamental principles of equality and non-discrimination". States may thus not deny access to education to any person on the basis that he is associated with a certain minority group. But, as is made clear by Recommendation 4, the achievement of an effective, genuine equality for persons belonging to minorities in the sphere of education can imply proactive measures in cases where an equilibrium of rights has to be established. This puts the onus on the state to provide comparable enjoyment of educational rights to members of minorities. In this regard, Recommendation 4 states in the spirit of article 2(1) ICESCR that "[w]here required, special measures should be adopted by States to actively implement minority language education rights to the maximum of their available resources, individually and through international assistance and co-operation, especially economic and technical".[318] This indicates that, generally, the state's duty to realise an effective, genuine equality for minorities in education is of a progressive nature. In accordance with the principles of non-discrimination and equality, where resources are scarce, this may not be used as an excuse to ignore the rights of minorities entirely. It may also not become a burden that minorities must shoulder more than the rest of society.[319]

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[317] *Ibidem* under the heading "Integration".

[318] The idea of proactive measures may be traced back in particular to paras. 31 and 33 Concluding Document of the Copenhagen Conference on the Human Dimension of the CSCE. Para. 31 encourages states to "adopt, where necessary, special measures for the purpose of ensuring to persons belonging to national minorities full equality with the other citizens in the exercise and enjoyment of human rights and fundamental freedoms". Para. 33 requires states to "protect the ethnic, cultural, linguistic and religious identity of national minorities on their territory and [to] create conditions for the *promotion* of that identity". Author's italics.

[319] See Siemienski, 1997 (UN Doc. E/CN.4/Sub.2/AC.5/1997/WP.3), see under the heading "Equality and non-discrimination".

Participation and decentralisation

Recommendation 5 suggests that "States should create conditions enabling institutions which are representative of members of the national minorities in question to participate, in a meaningful way, in the development and implementation of policies and programmes related to minority education". The right of persons belonging to minorities to participate effectively in the decision-making process, especially as it affects minorities, is an essential component of the democratic process.[320] Participation is stronger than consultation or informing minorities about matters decided at the central level. The concept of participation suggests partnership in planning.[321] An idea of what this might entail, may be gleaned from Recommendations 12 and 13 of the OSCE's *Lund Recommendations on the Effective Participation of National Minorities in Public Life* of 1999.[322] Recommendations 12 and 13 fall under the heading "Advisory and Consultative Bodies". Recommendation 12 advises states to establish such bodies "to serve as channels for dialogue" between governmental authorities and minorities.[323] Recommendation 13 comments that "[t]hese bodies should be able to raise issues with decision-makers, prepare recommendations, formulate legislative and other proposals, monitor developments and provide views on proposed governmental decisions that may directly or indirectly affect minorities. Governmental authorities should consult these bodies regularly regarding minority-related legislation and administrative measures . . .".

Participation should go hand in hand with a decentralisation of functions and the idea of subsidiarity.[324] Recommendation 6 Hague Recommendations thus states that "States should endow regional and local authorities with appropriate competences concerning minority education thereby also facilitating the participation of minorities in the process of policy formulation

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[320] The right of persons belonging to minorities to participate effectively in the decision-making process, especially as it affects minorities, is recognised in art. 2(2) and (3) Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, art. 15 Framework Convention for the Protection of National Minorities and para. 35 Concluding Document of the Copenhagen Conference on the Human Dimension of the CSCE.

[321] See Thornberry and Gibbons, 1996–1997, p. 143.

[322] The Lund Recommendations have been published as *Lund Recommendations on the Effective Participation of National Minorities in Public Life & Explanatory Note*, The Hague: Foundation on Inter-Ethnic Relations, 1999.

[323] Recommendation 12 Lund Recommendations points out that the said bodies might also include special purpose committees for addressing, for example, issues of education, language, and culture.

[324] In this context, note should be taken of art. 4(3) European Charter of Local Self-Government, which states, "Public responsibilities shall generally be exercised, in preference, by those authorities which are closest to the citizen. Allocation of responsibility to another authority should weigh up the extent and nature of the task and requirements of efficiency and economy".

at a regional and/or local level". Recommendation 7 continues that "States should adopt measures to encourage parental involvement and choice in the educational system at a local level, including in the field of minority language education". Recommendations 6 and 7 recognise the importance of self-governance for the effective participation of minorities in matters of education. The *Lund Recommendations* propose both non-territorial and territorial arrangements of self-governance.[325] Non-territorial arrangements are considered useful for "the maintenance and development of the identity and culture of national minorities".[326] Regarding territorial arrangements, it is stated that "States should favourably consider such territorial devolution of powers, including specific functions of self-government, particularly where it would improve the opportunities of minorities to exercise authority over matters affecting them".[327] Education, culture and the use of minority languages are perceived as issues particularly susceptible to regulation by both arrangements of self-governance.[328]

For an illustration of how the above principles may be concretised, reference may be made to the decision of the Supreme Court of Canada in the case of *Mahe v. Alberta*.[329] Section 23(3)(b) of the Canadian Charter of Rights and Freedoms states that "[t]he right of citizens of Canada . . . to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province . . . includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds". The Court considered that the use of the term "minority language educational facilities" was supportive of the conclusion that minority language parents had a right to management and control over the educational facilities in which their children were taught. The degree of management and control depended on the number of students to be served. At the upper level, this could mean an independent school board or, where the numbers did not quite justify this, representation on an existing school board.[330] Whereas an independent school board afforded a minority "the fullest measure of representation and control",[331] representation on an existing school board meant that

> [t]he minority language representatives should have exclusive authority to make decisions relating to the minority language instruction and facilities, including:

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[325] Recommendations 14–21 Lund Recommendations address the topic of "Self-Governance".
[326] Recommendation 17 Lund Recommendations.
[327] Recommendation 19 Lund Recommendations.
[328] Recommendations 18 and 20 Lund Recommendations, respectively.
[329] (1990) 1 S.C.R. 342.
[330] *Ibidem* at 344–345.
[331] *Ibidem* at 373.

(a) expenditures of funds provided for such instruction and facilities;
(b) appointment and direction of those responsible for the administration of such instruction and facilities;
(c) establishment of programs of instruction;
(d) recruitment and assignment of teachers and other personnel; and
(e) making of agreements for education and services for minority language pupils.[332]

Alternative education

The Hague Recommendations emphasise the importance of parents being able to opt for alternative forms of education for their children. Recommendation 8 thus states that "[i]n accordance with international law, persons belonging to national minorities, like others, have the right to establish and manage their own private educational institutions in conformity with domestic law. These institutions may include schools teaching in the minority language".[333] Private minority schools function as a vital safeguard against possible totalitarian state tendencies.[334] The demands of national regulation—fiscal, administrative *etc.*—should not crush the possibility of an active private minority education sector. Recommendation 9, therefore, makes it clear that "States may not hinder the enjoyment of [the right to found private schools] by imposing unduly burdensome legal and administrative requirements regulating the establishment and management of these institutions". There is no formal obligation for states to subsidise these private schools.[335] Recommendation 10 stresses that "[p]rivate minority language educational institutions are entitled to seek their own sources of funding without any hindrance or discrimination from the State budget, international sources and the private sector".

Interculturalism[336]

In a state in which majority and minority must live together, it is important that both majority and minority learn about each other, about their respective histories, cultures and traditions. Mustapha Mehedi states in this regard:

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[332] *Ibidem* at 377.
[333] The right of persons belonging to minorities to establish and manage their own private educational institutions is recognised in *e.g.* art. 13(4) ICESCR, art. 5(1)(c) CDE, art. 13 Framework Convention for the Protection of National Minorities and para. 32(2) Concluding Document of the Copenhagen Conference on the Human Dimension of the CSCE.
[334] See Thornberry and Gibbons, 1996–1997, p. 148.
[335] This is stated by the *Explanatory Note* to the Hague Recommendations, see note 311, p. 13. See the comments made at 10.5.1.4. and 10.5.2.2. *infra*, however, on the suggested approach for international law to the issue of public financing of private education.
[336] On the topic, see Graham-Brown, 1994, pp. 27–32.

> [C]ommunity life is possible only with an understanding of others, in other words, with an open-mindedness and an ability to put oneself in someone else's place, irrespective of racial, linguistic or religious differences. Education should allow the internalisation of attitudes facilitating an understanding of others.[337]

Education of this type may be termed "intercultural education".[338] Viewing such education as the ideal, Recommendation 19 calls upon states to ensure that "the general compulsory curriculum includes the teaching of the histories, cultures and traditions of their respective national minorities. Encouraging members of the majority to learn the languages of the national minorities living within the State would contribute to the strengthening of tolerance and multiculturalism within the State".[339] Recommendation 20 adds that "[t]he curriculum content related to minorities should be developed with the active participation of bodies representative of the minorities in question".[340] Conversely, and as is clear from Recommendation 1 mentioned above, the children of minority parents must be taught the history, culture, traditions and language of the majority.[341]

Thornberry and Gibbons hold that in all societies there must be a high degree of common learning to promote cohesiveness. They recommend, therefore, that there should be a model multicultural national curriculum for all pupils, including those from minorities. This, however, should then be adjusted as regards content, tone and style, depending on whether it guides education in majority or minority schools. The authors argue that

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[337] Mehedi, 1999a, para. 10 (UN Doc. E/CN.4/Sub.2/AC.5/1999/WP.5).

[338] Note should be taken of the report (UN Doc. E/CN.4/Sub.2/AC.5/2000/WP.4) of the International Seminar on Intercultural and Multicultural Education, held at Montreal, Canada from 29 September–2 October 1999. At para. 6 of the report, "intercultural education" is defined as "educational policies and practices by which the members of different cultures, whether in a majority or minority position, learn to interact constructively with each other . . . [and] learn about each other, about specific cultural characteristics, their respective histories and about the value of tolerance and pluralism". "Multicultural education" is defined as "educational policies and practices which meet the separate educational needs of groups in society which belong to different cultural traditions". Often, however, both terms are used interchangeably.

[339] The notion that the curriculum must teach the histories, cultures and traditions of minorities is encountered in *e.g.* art. 4(4) Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, art. 12(1) Framework Convention for the Protection of National Minorities and para. 34 Concluding Document of the Copenhagen Conference on the Human Dimension of the CSCE.

[340] Note should further be taken of Recommendation 21 (like Recommendations 19 and 20 also falling under the heading "Curriculum development"), which states, "States should facilitate the establishment of centres for minority language education curriculum development and assessment. These centres could be linked to existing institutions providing these can adequately facilitate the achievement of the curriculum related objectives".

[341] The notion that the children of minority parents must be taught the history, culture, traditions and language of the majority is encountered in *e.g.* art. 5(1)(c)(i) CDE, art. 4(4) Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities and art. 12(1) Framework Convention for the Protection of National Minorities.

national curricula should "narrate the story of the people as a whole".[342] They state that "[i]n a State with minority groups (all States in fact), curricula which recite only the achievements of the majority or founding nation are deficient"[343] and further that "[d]emeaning stereotypes, antagonistic reporting and triumphalism, in the contents of texts and the delivery of education and instruction, are all to be avoided".[344] They identify "civics" (political/social education), "geography" and "history" as particularly contentious subjects. As regards the teaching of "history", the authors make the commendable suggestion that a "scientific" assessment procedure should be set up together with the state, which both parties accept as the "kin-state" of the minority, to review textbooks and other materials for their "objectivity".[345]

Multilingualism[346]

In the Canadian case of *Mahe v. Alberta*, referred to above,[347] the Court affirmed:

> Language is also the key to cultural development. Language and culture are not synonymous, but the vitality of the language is a necessary condition for the complete preservation of a culture . . . the aim must be to provide for members of the minority an education appropriate to their linguistic and cultural identity.[348]

These words recognise that persons belonging to minorities should, during the educational process, acquire a proper knowledge of their mother tongue.[349] But, at the same time, they should, in accordance with the objective of integration of Recommendation 1, acquire a proper knowledge of the state language.[350] In order to meet this double aim, the Hague Recommendations propose the ideal of multilingualism.

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[342] Thornberry and Gibbons, 1996–1997, p. 140.
[343] *Idem.*
[344] *Ibidem* at p. 142.
[345] *Ibidem* at pp. 140–142.
[346] On the topic, see Jones and Warner, 1994, pp. 18–23.
[347] See the discussion of the matter of participation and decentralisation *supra.*
[348] (1990) 1 S.C.R. 342 at 362–363.
[349] The right of persons belonging to minorities to the teaching of or instruction in their mother tongue is recognised in *e.g.* art. 5(1)(c) CDE, art. 4(3) Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, art. 14(2) Framework Convention for the Protection of National Minorities, art. 8 European Charter for Regional or Minority Languages and para. 34 Concluding Document of the Copenhagen Conference on the Human Dimension of the CSCE.
[350] The responsibility of persons belonging to minorities to learn the state language is recognised in *e.g.* art. 5(1)(c)(i) CDE, art. 14(3) Framework Convention for the Protection of National Minorities, art. 8 European Charter for Regional or Minority Languages and para. 34 Concluding Document of the Copenhagen Conference on the Human Dimension of the CSCE.

With this ideal in mind, the Recommendations suggest a specific language mix at the pre-primary, primary and secondary levels of education. The *Explanatory Note* to the Hague Recommendations considers the said language mix to constitute a realistic interpretation of international norms and to be suggested by educational research.[351]

- At the *pre-primary* level, the medium of teaching should be the child's language.[352]
- At the *primary* level, the curriculum should be taught in the minority language. The minority language should be taught as a subject. The state language should also be taught as a subject, preferably by bilingual teachers. Towards the end of this period, a few non-theoretical subjects should be taught in the state language.[353]
- At the *secondary* level, a substantial part of the curriculum should be taught in the minority language. The minority language should be taught as a subject. The state language should also be taught as a subject, preferably by bilingual teachers. Throughout this period, the number of subjects taught in the state language should *gradually* be increased.[354]

The intention, therefore, is that, at the pre-primary, primary and secondary levels of education, the child should acquire a solid knowledge of both his mother tongue and the state language. As far as possible, the minority language should be used as the medium of instruction. The state language should be introduced gradually, thus "giving the mother tongue the space and time it needs to establish itself firmly in the child's psyche, so as to facilitate cognitive learning in any language".[355] The *Explanatory Note* makes it clear though that neither teaching exclusively in the state language nor exclusively in the minority language is in accordance with international law:

> Submersion-type approaches whereby the curriculum is taught exclusively through the medium of the State language and minority children are entirely integrated into classes with children of the majority are not in line with international standards. Likewise, this applies to segregated schools in which the entire curriculum is taught exclusively through the medium of the minority mother tongue, throughout the entire educational process and where the majority language is not taught at all or only to a minimal extent.[356]

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[351] See the *Explanatory Note* to the Hague Recommendations, see note 311, p. 14.
[352] Recommendation 11.
[353] Recommendation 12.
[354] Recommendation 13.
[355] Siemienski, 1997 (UN Doc. E/CN.4/Sub.2/AC.5/1997/WP.3), see under the heading "Multilingualism: striking the right balance".
[356] *Explanatory Note* to the Hague Recommendations, see note 311, p. 15.

Recommendation 14 recognises that "[t]he maintenance of the primary and secondary levels of minority language education depends a great deal on the availability of teachers trained in all disciplines in the mother tongue". It therefore recommends that "States should provide adequate facilities for the appropriate training of teachers and should facilitate access to such training".

Regarding *vocational training*, Recommendation 15 suggests that such training should be made accessible in the minority language in specific subjects "when persons belonging to the national minority in question have expressed a desire for it, when they have demonstrated the need for it and when their numerical strength justifies it".[357] Upon completion of such vocational training, students should, in terms of Recommendation 16, be able "to practice their occupation both in the minority and the State language". Recommendation 16 articulates the legitimate interest of the state that where it invests in the education of tradesmen and qualified technicians, it may reasonably expect them to be able to practice their trade not only in the region inhabited by the minority but wherever employment is available.[358]

Regarding *tertiary education*, Recommendation 17 suggests that persons belonging to minorities should have access to such education in their own language "when they have demonstrated the need for it and when their numerical strength justifies it".[359] Higher education in the minority language should not be seen as a luxury, as "every group needs its intellectuals and professionals to continue possibilities of cultural development and enrichment, and to defend the group".[360] Higher education in the minority language should, therefore, not be restricted to teacher training but must also include appropriate other disciplines.[361] Recommendation 17 states further that "[m]inority language tertiary education can legitimately be made available to national minorities by establishing the required facilities within

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[357] The size criterion for minority rights should not be applied in a rigid fashion. Placing too much reliance on the size of the minority may be counterproductive. The implication appears to be that, the larger a minority is, the greater must be the effort on the part of the state to deliver rights. The opposite may be more appropriate. As stated by Thornberry and Gibbons, 1996–1997, p. 144, "Larger groups can be self-sustaining, with higher linguistic vitality, and contain within themselves considerable potential for cultural and linguistic, *etc*. development. Smaller groups may need considerable support for effectively exercised rights".

[358] See Siemienski, 1997 (UN Doc. E/CN.4/Sub.2/AC.5/1997/WP.3), see under the heading "Multilingualism: striking the right balance".

[359] See the comments made concerning the size criterion in note 357 *supra*. See further Recommendation 18, which states that "[i]n situations where a national minority has, in recent history, maintained and controlled its own institutions of higher learning, this fact should be recognised in determining future patterns of provision".

[360] Thornberry and Gibbons, 1996–1997, p. 147.

[361] See the *Explanatory Note* to the Hague Recommendations, see note 311, p. 16.

existing educational structures provided these can adequately serve the needs of the national minority in question". The Hague Recommendations clearly prefer such integrated educational infrastructures to parallel infrastructures, for two reasons: Firstly, setting up minority facilities within existing educational structures takes account of fiscal limitations and, secondly, and more importantly, doing so recognises the potential danger of parallel infrastructures, that the minority may become isolated from the majority.[362] Recommendation 17, finally, refers to private minority educational institutions at the tertiary level. It states that "[p]ersons belonging to national minorities may also seek ways and means to establish their own educational institutions at the tertiary level". Lastly, a few words should be said on entrance examinations for higher education in the state language for candidates of minority language mother tongue who have followed education predominantly in the mother tongue. Such language testing appears to be directed at establishing an objective condition for entry, fluency in the state language, a condition which, on the face of it, seems to be unrelated to the particular circumstances of a group. The truth, however, is that this condition weighs particularly against persons belonging to minorities, speaking, as they do, a different language at home and having been educated predominantly in that language. The said language testing denies to members of minorities equality of access to higher education.[363] It "pushes" national language learning at the lower levels of education. This may be tantamount to "assimilating minorities against their will".[364]

3.3.3.3.3. *The education rights of minorities in the matter of religion*

Finally, a few words will be said on the education rights of minorities in the matter of religion.[365] This element has not been dealt with in the OSCE's Hague Recommendations Regarding the Education Rights of National Minorities of 1996, discussed above.

Reference may in this regard be made to a study, entitled *Racial Discrimination, Religious Intolerance and Education*, prepared by Abdelfattah Amor, former Special Rapporteur of the Commission on Human Rights on Freedom of Religion or Belief.[366] Amongst others, the Special Rapporteur com-

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[362] See *idem*.

[363] See Thornberry and Gibbons, 1996–1997, p. 147.

[364] *Idem*.

[365] See in this context also the discussion of the freedom aspect of the right to education, as protected in art. 13(3) and (4) ICESCR, at 10.5. *infra*.

[366] Study, entitled *Racial Discrimination, Religious Intolerance and Education*, prepared by Abdelfattah Amor, former Special Rapporteur of the Commission on Human Rights on Freedom of Religion or Belief for the Preparatory Committee of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, held at Durban,

ments on the content of the right to freedom of education, incorporating a minority perspective in his discussion.[367] Amor holds that the right to freedom of education entails the following aspects:

- Members of minority religious groups may establish and direct private schools, which must conform to minimum educational standards.[368]
- Respect must be shown for the right of parents practising minority religions to choose for their children private schools offering an education in conformity with their convictions, provided the education given meets minimum quality standards.[369]
- The state is required to take the necessary measures to provide within its own education system for the religious education of children in accordance with their parents' convictions and, therefore, those of minority religious groups.[370]
- The state is obliged to protect the denominational pluralism of individuals and groups in public education against domination by one religion, such as would compel them to receive religious instruction inconsistent with their convictions.[371]
- Instruction in subjects such as the general history of religion and ethics must be given in an unbiased and objective way. It may not convey a historically negative image of a religion, or transmit a biased and scientifically unfounded interpretation of historical facts, or resort to invidious distinctions or value judgements concerning a people or a minority on the grounds of its religion or belief.[372]

South Africa from 31 August–8 September 2001, and contained in UN Doc. A/CONF.189/PC.2/22 of 3 May 2001.

[367] See Amor, 2001, paras. 40–59 (UN Doc. A/CONF.189/PC.2/22).

[368] See Amor, 2001, para. 42 (UN Doc. A/CONF.189/PC.2/22). The author cites art. 13(4) ICESCR in support.

[369] See Amor, 2001, paras. 42–44 and 50 (UN Doc. A/CONF.189/PC.2/22). The author cites art. 13(3) ICESCR in support.

[370] See Amor, 2001, para. 51 (UN Doc. A/CONF.189/PC.2/22). The author cites art. 5(2) Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981) in support, which states in part, "Every child shall enjoy the right to have access to education in the matter of religion or belief in accordance with the wishes of his parents or, as the case may be, legal guardians . . .".

[371] See Amor, 2001, para. 51 (UN Doc. A/CONF.189/PC.2/22). The author cites art. 18(2) ICCPR in support, which states, "No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice". As will be explained at 10.5.1.3.3.4. and 10.5.1.3.4.1. *infra*, the right of parents in art. 13(3) ICESCR—to ensure their children's religious education in conformity with their own convictions—obliges states parties to take care that in public education information of a directly or indirectly religious nature (*i.e.* in subjects other than religious instruction) is conveyed objectively.

[372] See Amor, 2001, para. 53 (UN Doc. A/CONF.189/PC.2/22). In support, the author cites para. 28 General Comment No. 13, see note 10. See also 10.5.1.3.3.2. *infra.*

- Public education which includes instruction in a particular religion or belief is not acceptable, unless provision is made for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents.[373]

The present writer endorses the comments of the Special Rapporteur. It is submitted, however, that, regarding the third point, concerning the provision of religious education in public education, states may also, rather than providing for the religious education of children belonging to minority religious groups in public schools, grant state funding to private schools which are operated by such groups.[374]

The discussion of minority education rights in the matter of religion should further refer to the case of *Arieh Hollis Waldman v. Canada*, decided by the HRC in 1999.[375] As to the facts in this case, the author of the communication, residing in the Canadian province of Ontario, was a member of the Jewish faith who enrolled his two children in a private Jewish school. In Ontario, full and direct public funding was provided to Roman Catholic schools, which functioned as part of a separate—but non-private—school system, which existed alongside the public school system. The special position of these schools was enshrined in the Canadian Constitution. All other religious schools by necessity were private. Such schools did not receive funding on an equal basis with Roman Catholic schools. The author claimed that this violated article 26 ICCPR—the Covenant's non-discrimination/equality provision—arguing that the preferential treatment accorded Roman Catholic *vis-à-vis* Jewish schools discriminated on the basis of religion. Both Roman Catholics and Jews are religious minorities in relation to Protestants in Ontario.

The HRC agreed with the author's claim. It found that the preferential treatment was not reasonable and objective. The Committee held that the material before it did not show that members of the Roman Catholic community were in a disadvantaged position compared to those members of the Jewish community that wished to secure their children's education in religious schools. The Committee stated that the fact that the preferential treatment was enshrined in the Constitution did not render it reasonable and objective.[376] The HRC went on to formulate as a general principle:

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[373] See Amor, 2001, para. 54 (UN Doc. A/CONF.189/PC.2/22). In support, the author cites para. 28 General Comment No. 13, see note 10. See also 10.5.1.3.3.2. *infra.*

[374] In states whose constitutions prescribe a strict separation of state and church appropriate alternative ways of furthering minority religious education will have to be found.

[375] *Arieh Hollis Waldman v. Canada*, HRC, Communication No. 694/1996, 05/11/1999, UN Doc. CCPR/C/67/D/694/1996.

[376] See *ibidem* at 10.4.

> [T]he Covenant does not oblige States parties to fund schools which are established on a religious basis. However, if a State party chooses to provide public funding to religious schools, it should make this funding available without discrimination.[377]

In other words, where a state party provides public funding to religious schools, it must not discriminate between such schools. Martin Scheinin, in his concurring individual opinion, states that "[i]n order to avoid discrimination in funding religious . . . education for some but not all minorities States may legitimately base themselves on whether there is a constant demand for such education" and "if demands for religious schools do arise, one legitimate criterion for deciding whether it would amount to discrimination not to establish a public minority school or not to provide comparable public funding to a private minority school is whether there is a sufficient number of children to attend such a school so that it could operate as a viable part in the overall system of education".[378]

The HRC's statement that "the Covenant does not oblige States parties to fund schools which are established on a religious basis" is peculiar. The HRC itself admits that article 27 ICCPR on the rights of persons belonging to minorities also entails positive obligations concerning minority culture, religion and language.[379] In this writer's view, states parties have an obligation to provide for the religious education of children belonging to minority religious groups in public schools, alternatively, to grant state funding to private schools which are operated by such groups, if the criteria formulated by Scheinin have been met.[380]

4. *Article 4 ICESCR: The Limitation of Covenant Rights*

Article 4 ICESCR is a general limitation provision. As such, it fulfils a dual function. Firstly, it is permissive: It authorises states parties to restrict the enjoyment of the rights protected under the ICESCR. Secondly, it is protective: It protects Covenant rights by laying down the manner in which and the purposes for which limitations may be imposed on the rights protected.[381] It provides as follows:

> The States Parties to the present Covenant recognise that, in the enjoyment of those rights provided by the State in conformity with the present Covenant,

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[377] *Ibidem* at 10.6.
[378] Concurring individual opinion of Martin Scheinin, at 5.
[379] See the discussion of art. 27 ICCPR at 4.11.1. *supra.*
[380] See the comments made at 10.5.1.4. and 10.5.2.2. *infra* on the suggested approach for international law to the issue of public financing of private education.
[381] See Alston and Quinn, 1987, pp. 192–193 and Coomans, 1992, p. 38.

> the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

Article 4 suggests that it can only be relied upon, where and in so far as rights under the Covenant have already been implemented. This may be deduced from the words ". . . in the enjoyment of those rights provided by the State in conformity with the present Covenant . . .".[382]

Article 4 also applies to the right to education in article 13 ICESCR.[383] In paragraph 42 of General Comment No. 13,[384] the CESCR states:

> The Committee wishes to emphasise that the Covenant's limitations clause, article 4, is primarily intended to be protective of the rights of individuals rather than permissive of the imposition of limitations by the State.[385] Consequently, a State party which closes a university or other educational institution on grounds such as national security or the preservation of public order has the burden of justifying such a serious measure in relation to each of the elements identified in article 4.

The protective function of article 4 is reflected in the requirements that limitations of Covenant rights be "determined by law", "compatible with the nature of these rights" and "solely for the purpose of promoting the general welfare in a democratic society".

The reference to "law" in the phrase "*determined by law*"[386] is a reference to a "national law of general application".[387] The said law—which may take the form of written or unwritten law[388]—may thus not regulate a single case or group of cases. The legal rules limiting the exercise of Covenant rights must further be "clear and accessible to everyone".[389] The requirement that the limiting law be "clear" means that it must be forseeable as to its effects. Paragraph 49 Limburg Principles also requires that the law imposing the limitation "shall not be arbitrary or unreasonable or discriminatory". In other words, limitations of Covenant rights are subject to

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[382] See Coomans, 1992, p. 38.

[383] The CRC does not contain a general limitation provision. Certain of its rights provisions contain limitation clauses applicable to the rights provisions concerned. There is no such clause for the right to education in arts. 28 and 29, however. Even so, limitations of the right to education will often be inevitable. What is said on art. 4 ICESCR in the discussion below, is, therefore, also relevant with regard to arts. 28 and 29 CRC.

[384] See note 10.

[385] Para. 46 Limburg Principles, see note 7, states the same.

[386] For comments on this requirement, see Alston and Quinn, 1987, pp. 199–200.

[387] Limburg Principles, see note 7, para. 48.

[388] "Written law" covers statutes, enactments of a lower rank than statutes and regulatory measures taken by professional regulatory bodies under independent rule-making powers delegated to them by parliament. "Unwritten law" means judge-made law.

[389] Limburg Principles, see note 7, para. 50.

a "reasonableness" criterion. This means, firstly, that a limitation must promote a legitimate aim (the general welfare in a democratic society) and, secondly, that there must exist a relationship of proportionality between the limitation and the aim. The test of proportionality involves an examination as to whether the limitation concerned is a suitable, necessary and appropriate means to achieve the stated aim. Paragraph 51 Limburg Principles, finally, comments that "[a]dequate safeguards and effective remedies shall be provided by law against illegal or abusive imposition or application of limitations on economic, social and cultural rights".

Limitations must, in terms of article 4, be "*compatible with the nature of [Covenant] rights*".[390] This element implies that the legitimacy of limitations must always be considered in the context of the particular right to be limited. Limitations may not jeopardise the essence of a specific right.[391] A right's nucleus must always remain intact.[392]

Limitations may further only be applied if their sole purpose is to promote "*the general welfare*".[393] Alston and Quinn show that the particular concern of the drafters of article 4, in adding the notion of "general welfare", was "to ensure that limitations could not lightly be justified".[394] Governments often seek to justify limitations of Covenant rights by reference to concerns, such as national security or the imperatives of economic development. In terms of the limitation provision, such reasons can only be invoked if they are genuinely synonymous with "the general welfare".[395] Paragraph 52 Limburg Principles[396] states that "general welfare" "shall be construed to mean furthering the well-being of the people as a whole".

"General welfare" refers to the general welfare "*in a democratic society*".[397] Paragraph 53 Limburg Principles[398] stresses that the expression "in a democratic society" imposes "a further restriction on the application of limitations". Paragraph 54 emphasises that the burden of demonstrating that limitations do not impair the democratic functioning of the society is upon the state which imposes limitations. It is not altogether clear what constitutes a "democratic society". According to paragraph 55, this is a society

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[390] For comments on this requirement, see Alston and Quinn, 1987, p. 201.
[391] Limburg Principles, see note 7, para. 56.
[392] Alston and Quinn, 1987, p. 201 argue that the nature of a right may be such as to rule out limitations. Note should be taken of para. 47 Limburg Principles, see note 7, in this regard, which states that art. 4 "was not meant to introduce limitations on rights affecting the subsistence or survival of the individual or integrity of the person".
[393] For comments on this requirement, see Alston and Quinn, 1987, pp. 202–203.
[394] *Ibidem* at p. 202.
[395] *Ibidem* at pp. 202–203.
[396] See note 7.
[397] For comments on this requirement, see Alston and Quinn, 1987, pp. 203–205.
[398] See note 7.

which recognises and respects the human rights of the UN Charter and the UDHR.

As far as the right to education is concerned, the following may be seen as instances of regulating this right or, where considered limitations within the meaning of article 4, as restrictions which promote "the general welfare in a democratic society":[399]

- States may provide that primary schools must, as a rule, be attended at the place of residence.
- They may, within limits, stipulate the age at which children should start going to school.
- They may decide on the structure of the school system. They may prefer a system of comprehensive schools, or a system which provides instruction for students of differing capacity in different types of schools, or a combination of the two systems.
- States may lay down which subjects are offered, which subjects are compulsory and which subjects optional, and what priority should be given to the different subjects. This is subject to restrictions, however. Reference should be made to the issue of language rights, discussed at length above,[400] and also to the CESCR's conviction, articulated, for example, in its Concluding Observations on the fourth periodic report of Sweden, that human rights education be provided in schools at all levels.[401]
- They may determine which disciplinary measures are applied in schools, provided, however, that, in accordance with article 28(2) CRC ". . . school discipline is administered in a manner consistent with the child's human dignity . . .".
- They may adopt regulations making the wearing of school uniforms compulsory. The former European Commission of Human Rights has held that the constraints imposed by school uniform rules were not "so serious as to constitute an interference with the right to respect for private and family life".[402]
- States may define the requirements for admission to certain schools. Generally, this does not apply to primary education. States may, how-

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[399] Generally, see the discussion by Wildhaber, 1986/2000, in the context of art. 2 First Protocol ECHR, of the state's discretion in the set-up of the educational system, at pp. 12–14, paras. 33–45, and of the issue of limitations of the right to education, at pp. 30–31, paras. 108–116.

[400] See 9.3.3.2. and 9.3.3.3.3.2. (multilingualism) *supra*.

[401] Concluding Observations of the CESCR: Sweden (fourth periodic report), 27th Session, reproduced in UN Doc. E/2002/22, para. 742.

[402] Commission, Application No. 11674/85, *Stevens v. United Kingdom*, Admissibility Decision of 3 March 1986.

ever, restrict access to secondary schools preparing students for university admission, schools or colleges of art, technical schools or colleges, schools for gifted students, or universities, to those students which possess the required capacity, knowledge or talent.[403]

- They may define the skills and knowledge levels to be attained at each stage of the educational process, in order to move on to the next stage. This means that students who fail to achieve the said levels may legitimately be denied access to the next stage.[404]
- States are free to decide whether they favour a school system comprising primarily public schools, financed and operated by the state, or a system relying extensively on the educational services of private schools, possibly subsidised by the state, but operated privately, and subject to state supervision to ensure compliance with certain minimum standards.
- States may regulate which forms of adult education are established and supported.
- In the sphere of higher education, states may, as a result of resource constraints, have only a limited number of admission seats available in universities. In this case, states may place restrictions on admission to university. Restrictions may, however, only be based on capacity, in accordance with article 13(2)(c) ICESCR.[405]

It has been shown above that where a state party to the ICESCR takes retrogressive measures, the CESCR places two potential defences at its disposal: The state party may seek to exculpate itself by demonstrating that the measures are justified either by reference to the totality of Covenant rights or in the context of the full use of its maximum available resources.[406] It may now be asked whether article 4 ICESCR constitutes a third potential defence, where a state party, due to resource constraints, restricts Covenant rights by taking retrogressive measures. The *travaux préparatoires* of article 4 show that the limitation provision relates to restrictions other than those which are the result of resource constraints. According to Alston and Quinn, however, article 4 can also be relied upon in the case of resources constraints. Where a state party decides to avail itself of the

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[403] See, however, the remarks made on language testing for persons belonging to minorities at 9.3.3.3.3.2. (multilingualism) *supra*.

[404] Wildhaber, 1993, p. 532 points out that the former European Commission of Human Rights "has repeatedly held that the refusal of promotion because of insufficient performance does not violate the right to education *per se*". See the case references provided by Wildhaber, 1993, p. 532, note 7.

[405] As will be seen at 10.4.4.2. and 10.4.4.4. *infra*, restrictions on admission to university are already envisaged by the very structure of art. 13(2)(c) ICESCR.

[406] See 9.2.2.4. *supra*. The topic of deliberately retrogressive measures is also dealt with at 9.2.2.5.2. *supra* and 12.3.2.3.2.5. *infra*.

defence in article 4 to justify retrogressive measures, it will have to satisfy all the elements of article 4.[407]

If one now takes up the issue of retrogressive measures in the form of the introduction or increase of study fees at the secondary or tertiary level of education once more,[408] and attempts to justify these measures in relation to article 4 ICESCR, the following may be observed: The measures could be stated not to be compatible with the nature of the right to education, *i.e.* the essence of this right, to the extent that they discourage or prevent students from families which earn a low income from pursuing secondary or higher education. Unhampered and non-discriminatory access to education may be said to form part of the nucleus of the right to education.[409]

[407] See Alston and Quinn, 1987, pp. 205–206. Interestingly, Craven, 1995, p. 132 opines that retrogressive measures "represent a 'limitation' on the enjoyment of the rights and accordingly should be justified in relation to article 4".

[408] See 9.2.2.4. *supra.*

[409] See Coomans and Jansen, 1991, p. 195.

CHAPTER TEN

ARTICLE 13 OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: THE RIGHT TO EDUCATION

1. *Introduction*

The purpose of this Chapter is to analyse article 13 of the International Covenant on Economic, Social and Cultural Rights. First, a few words will be said on the first sentence of article 13(1). Article 13(1) first sentence recognises everyone's right to education. It will be explained that this provision should be seen as an open-ended fundamental norm in the sphere of education. This will be followed by a commentary on the aims of education, as laid down in article 13(1). The discussion in this regard will substantially rely on General Comment No. 1 of the Committee on the Rights of the Child on the educational aims in article 29(1) of the Convention on the Rights of the Child. Subsequently, article 13(2), which protects the social aspect of the right to education, will be studied. There will thus be an analysis of the guarantees contained in each of article 13(2)(a) to (e) on primary, secondary, higher and fundamental education, and developing a system of schools, establishing a fellowship system and improving the material conditions of teaching staff, respectively. This will, however, be preceded by an examination of four essential features which education, in all its forms and at all levels, is required to exhibit: Education must be available, accessible, acceptable and adaptable. The 4-A scheme for studying the obligations in article 13(2) has been developed by Katarina Tomaševski, former Special Rapporteur of the Commission on Human Rights on the Right to Education. The said scheme promises to facilitate a holistic understanding of the right to education. Thereafter, the freedom aspect of the right to education, as protected in article 13(3) and (4), will be studied. Whereas paragraph (3) guards parental rights in the field of education, paragraph (4) guarantees the right of individuals and bodies to establish and direct educational institutions. In this respect, relevant case law of the Human Rights Committee, supervising the ICCPR, and of the former European Commission of Human Rights and the European Court of Human Rights, will be referred to. The discussion of article 13 will be concluded by suggesting that the tri-partite typology of state obligations discussed in Chapter 3, in terms of which all human rights entail obligations

to respect, protect and fulfil, may be usefully applied to analyse the normative content of the right to education, as protected in article 13. Whenever appropriate, the discussion of article 13 in this Chapter will refer to General Comments Nos. 11[1] and 13.[2] Whereas the former concerns plans of action for compulsory and free primary education under article 14 ICESCR, the latter deals with the right to education under article 13 ICESCR.

2. *Article 13(1) First Sentence ICESCR: A General Right to Education*

Article 13(1) first sentence ICESCR[3] states:

> The States Parties to the present Covenant recognise the right of everyone to education.

Article 13(1) first sentence does not stand isolated. The provision introduces a series of guarantees which must be understood to explain the right to education laid down in this provision. Article 13(1) second and third sentence set out the aims of education which must be assured in schools, article 13(2) formulates certain requirements for the different levels of the education system and article 13(3) and (4) provide protection against undue interference by states parties in the sphere of education.

It may be asked whether the various guarantees mentioned exhaust the normative content of article 13(1) first sentence, or whether they merely serve to illustrate some of the implications of the right to education in article 13(1) first sentence.

A number of arguments can be advanced in support of the former contention. Article 13(2), for example, expressly refers to the right to education in the first sentence of article 13(1)[4] before setting out the duties of states parties in relation to the different levels of education in five clearly structured subparagraphs. This appears to suggest that there are no obligations for states parties beyond those mentioned in the said subparagraphs.[5] A comparison with other rights provisions of the ICESCR further shows that the scheme used in article 13 of first mentioning the basic right protected, which is then followed by individual guarantees, is typical. In two

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[1] CESCR, General Comment No. 11 (Twentieth Session, 1999) [UN Doc. E/2000/22] Plans of action for primary education (art. 14 ICESCR) [*Compilation*, 2004, pp. 60–63]. The full text of the General Comment is included in the Annex to this book.

[2] CESCR, General Comment No. 13 (Twenty-First Session, 1999) [UN Doc. E/2000/22] The right to education (art. 13 ICESCR) [*Compilation*, 2004, pp. 71–86]. The full text of the General Comment is included in the Annex to this book.

[3] On art. 13(1) first sentence ICESCR, see Gebert, 1996, pp. 286–292.

[4] Art. 13(2) ICESCR states, "The States Parties to the present Covenant recognise that, with a view to achieving the full realisation of *this right* . . .". Author's italics.

[5] See Gebert, 1996, p. 286.

instances, it is made clear that the individual guarantees should not be understood in an exhaustive sense. These instances are article 6 on the right to work and article 7 on the right to just and favourable conditions of work. Article 6(1) states that the right to work "includes" certain guarantees, whereas article 7 uses the phrase "in particular" before listing various guarantees flowing from the right to just and favourable conditions of work. The implication is that only in the cases of articles 6 and 7 are the individual guarantees illustrative of the duties under the basic right protected, whereas in the other cases, including that of article 13, they are exhaustive of the duties.[6]

It is submitted, however, that article 13(1) first sentence should be conceived as an open-ended fundamental norm in the sphere of education. Two considerations weigh in favour of such a construction.

The first consideration is of a comparative law nature. Article 28(1) CRC is comparable to article 13(1) first sentence read with article 13(2), from a structural point of view. Like the first sentence of article 13(1), the first part of the opening statement of article 28(1) CRC states that "States Parties recognise the right of the child to education . . .". Further, in the same way that article 13(2) deduces duties of states parties in relation to the different levels of education from the basic right to education protected in article 13(1) first sentence, article 28(1) CRC deduces such duties from the basic right to education protected in the opening statement of article 28(1). In fact, the duties in the CRC resemble those in the ICESCR to a large extent. But, unlike article 13(2), article 28(1) CRC expressly considers these duties not to exhaust the basic right to education. Article 28(1) CRC stipulates that states parties must, with a view to realising the right to education, perform "in particular" the duties stated, which means that other relevant duties must also be performed. If it is now appreciated that the CRC has been ratified by virtually all states of the world, and that it is binding upon these states, much may be said in support of a reading of the ICESCR which conforms with the CRC,[7] in the sense that the basic right to education in article 13(1) first sentence should also be considered as an open-ended norm in the sphere of education.[8]

The second consideration in favour of an open-ended norm is that the practice of the CESCR, as the most important interpretative organ with regard to the ICESCR, lends support to such an interpretation. The Committee views the education system as a coherent order for which a state

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[6] See *ibidem* at pp. 286–287.

[7] The wide ratification of the CRC attests to this instrument's importance. In accordance with the *lex posterior* rule, its provisions should prevail over those of the ICESCR to the extent that they are more beneficial for the protection of human rights.

[8] See Gebert, 1996, pp. 287–288.

party bears responsibility. The Committee has, accordingly, in its consideration of state reports, commented on various aspects of the diverse national education systems, which are not directly provided for in article 13, but which it considers to be covered by this provision. The examination of the Committee's practice, *i.e.* its Concluding Observations, in Chapter 11 below, will clearly show this.[9] It suffices here to illustrate the point by mentioning an example: It will be noted that article 13(2) provides for primary, secondary, higher and fundamental education, but that it does not provide for pre-school education. Nevertheless, in its Concluding Observations on the second periodic reports of the United Kingdom, the following remark is made:

> The Committee regrets that insufficient measures have been taken towards the development of a universal pre-school education scheme. . . .[10] . . . The Committee also recommends that priority should be given to expand access to pre-school education and to develop basic skill programmes in reading, writing and numeracy, particularly to the benefit of children up to the age of seven. . . .[11]

It is clear, therefore, that despite the Covenant's silence on the matter, the Committee considers article 13(2) to cover pre-school education.

In summary, article 13(1) first sentence ICESCR should be seen as an open-ended fundamental norm in the sphere of education. It is difficult, of course, to gauge what the normative content of article 13(1) first sentence is in more precise terms. The Concluding Observations of the Committee go some way towards determining this content. However, the procedure of reviewing state reports is not the most ideal method of doing so. An individual/group petition procedure to the ICESCR would greatly enhance the possibilities for developing the normative potential of the first sentence of article 13(1).[12]

3. *Article 13(1) Second and Third Sentence ICESCR: The Aims of Education*

Article 13(1) second and third sentence ICESCR[13] states:

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[9] General Comment No. 13, see note 2, unfortunately, does not make a clear statement on the nature of art. 13(1) first sentence ICESCR.

[10] Concluding Observations of the CESCR: United Kingdom of Great Britain and Northern Ireland (part dealing with the United Kingdom of Great Britain and Northern Ireland and its Dependent Territories, with the exception of Hong Kong) (second periodic reports concerning the rights covered by articles 10 to 12 and 13 to 15 ICESCR), 11th Session, reproduced in UN Doc. E/1995/22, para. 276.

[11] UN Doc. E/1995/22, para. 278.

[12] The matter of an individual/group complaints procedure to the ICESCR is addressed at 12.3.2.2. *infra.*

[13] On art. 13(1) second and third sentence ICESCR, see Gebert, 1996, pp. 319–335.

> [The States Parties] agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

In terms of paragraph 4 General Comment No. 13,[14] these aims of education apply to all forms of education, "whether public or private, formal or non-formal".[15]

3.1. *The Aims of Education in Article 13(1) Second and Third Sentence ICESCR: The Reason for Their Inclusion in Article 13, Their Significance, and Their Functions*

The right to education, as an ESCR, primarily entails an obligation for the state to create an educational infrastructure. The state must assure that the institutions and facilities for education are available. It must hence provide the external structures for education. The aims of education, however, concern the content of education, *i.e.* the internal aspect of education. At first sight, therefore, the inclusion of educational aims in the definition of the right to education as an ESCR seems out of place. *The question thus arises, why aims of education were included in article 13 ICESCR.*

The answer to this question must be sought in the historical context which accompanied the drafting of the International Bill of Human Rights in the late 1940s and the early 1950s. At the time, the world community debated the causes and consequences of World War II. The United Nations Organisation had just been founded in 1945 to ensure the future maintenance of international peace and security, in order to prevent any further world war. The Commission on Human Rights, which prepared the UN human rights instruments, was fully aware of this background. When drafting article 13, it was appreciated, therefore, that an education system, premised on false educational ideals, constituted a threat to the commitment of maintaining international peace and security. In particular, the Jewish side pointed to the disastrous consequences of the national socialist education system in Germany, which was well-organised, but, at the same time, corrupted by an ideology which dictated blind obedience and racial hatred. These false ideals were an important cause of the Second World War. By providing in article 13(1) that education should be directed

[14] See note 2.

[15] Generally, on the aims of education in international and regional legal instruments and their classification, see Hodgson, 1998, pp. 71–84.

to "the full development of the human personality", it was thus envisaged that education should serve to liberate the individual and prevent his instrumentalisation by the state in its pursuit of "higher state interests". The aims of "respect for human rights and fundamental freedoms" and "understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups" were meant as an expression of criticism of all forms of racism.[16] Accordingly, aims of education were included in article 13 ICESCR to strengthen the UN's role in maintaining global peace. Paragraph 4 General Comment No. 13[17] hence remarks that the educational aims "reflect the fundamental purposes and principles of the UN as enshrined in articles 1 and 2 of the Charter of the United Nations".

The inclusion of aims of education in article 13 is of some importance. The *significance* of article 13(1) second and third sentence may be demonstrated by referring to the Committee on the Rights of the Child's General Comment No. 1, adopted in 2001, during its twenty-sixth session,[18] which deals with the aims of education, stipulated in article 29(1) CRC.[19] In paragraphs 1 to 4 General Comment No. 1, the ComRC regards article 29(1) CRC to be a significant provision for a number of reasons. The reasons mentioned are equally valid *mutatis mutandis* for article 13(1) second and third sentence:

- The aims of education agreed to by the states parties promote, support and protect the core value of the convention: the human dignity innate in every child and his equal and inalienable rights. The aims are all linked directly to the realisation of the child's human dignity and rights. (See paragraph 1.)
- The aims of education agreed to by the states parties insist upon the need for education to be child-centred, child-friendly and empowering. Education must be designed "to provide the child with life skills, to strengthen the child's capacity to enjoy the full range of human rights and to promote a culture which is infused by appropriate human rights values". Education must empower the child, by developing his skills, learning capacities and human dignity. (See paragraph 2.)

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[16] See, generally, in this regard UN Docs. E/CN.4/SR.67, pp. 12 *et seq*., E/CN.4/SR.68, p. 15, E/CN.4/SR.69, p. 3 and E/CN.4/SR.226, pp. 19 *et seq*.

[17] See note 2.

[18] ComRC, General Comment No. 1 (Twenty-Sixth Session, 2001) [UN Doc. CRC/C/103] The aims of education (art. 29(1) CRC) [*Compilation*, 2004, pp. 294–301]. The full text of the General Comment is included in the Annex to this book.

[19] Art. 29(1) CRC is cited at 4.5.2. *supra*. Art. 29(1) repeats the aims of art. 13(1) second and third sentence, but also mentions certain new aims.

- The aims of education agreed to by the states parties make it clear that the right to education is not only a matter of access, but also of content. In the ComRC's words, "[a]n education with its contents firmly rooted in the values of article 29(1) is for every child an indispensable tool for her or his efforts to achieve in the course of her or his life a balanced, human rights-friendly response to the challenges that accompany a period of fundamental change driven by globalisation, new technologies and related phenomena". (See paragraph 3.)
- The aims of education agreed to by the states parties reflect the conviction that education should be directed to a wide range of values. Some of the diverse values might be thought to be in conflict with each other in certain cases. The importance of the provision on the aims of education, however, lies precisely "in its recognition of the need for a balanced approach to education and one which succeeds in reconciling diverse values through dialogue and respect for difference". (See paragraph 4.)

The aims of education in article 13 also fulfil certain concrete functions. In establishing the *functions* of article 13(1) second and third sentence, guidance may again be sought from the ComRC's General Comment No. 1. The deliberations of the ComRC, in paragraphs 5 to 14 General Comment No. 1, are equally valid *mutatis mutandis* for article 13(1) second and third sentence.

The aims of education thus serve to emphasise that the educational process must be based on the values expressed by the educational aims. In other words, the content of the curriculum, the pedagogical methods and the environment within which education takes place must promote the said values. The child must, for example, be encouraged to express his views freely. Education must further be provided in a way that ensures non-violence in schools. "The participation of children in school life, the creation of school communities and student councils, peer education and peer counselling, and the involvement of children in school disciplinary proceedings should be promoted as part of the process of learning and experiencing the realisation of rights".[20]

The aims of education underline that the child has a right to a specific quality of education. As these aims state that education must further the full development of the child's personality, education must be child-centred.[21] The ComRC thus states:

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[20] General Comment No. 1, see note 18, para. 8.

[21] The ComRC, see *ibidem* at para. 22, remarks that "[e]very child has the right to receive an education of good quality which in turn requires a focus on the quality of the learning environment, of teaching and learning processes and materials, and of learning

> [T]he curriculum must be of direct relevance to the child's social, cultural, environmental and economic context and to his or her present and future needs and take full account of the child's evolving capacities; teaching methods should be tailored to the different needs of different children. Education must also be aimed at ensuring that essential life skills are learnt by every child. . . . Basic skills include not only literacy and numeracy but also life skills such as the ability to make well-balanced decisions; to resolve conflicts in a non-violent manner; and to develop a healthy lifestyle, good social relationships and responsibility, critical thinking, creative talents, and other abilities which give children the tools needed to pursue their options in life.[22]

The requirement that education be directed to the development of the child's personality is also an effective remedy against discriminatory practices in education. Such practices are capable of undermining or even destroying the capacity of the child to benefit from the educational opportunities needed to develop his personality. Hence, by demanding that education be directed to the development of the child's personality, it is also required that it be free from discriminatory practices. The ComRC considers the aims of education to afford protection, for example, against "practices such as a curriculum which is inconsistent with the principles of gender equality, . . . arrangements which limit the benefits girls can obtain from the educational opportunities offered, and . . . unsafe or unfriendly environments which discourage girls' participation".[23] But, education which reflects the mentioned aims of education is also a powerful weapon in the struggle against racial discrimination. As formulated by the ComRC:

> Racism and related phenomena thrive where there is ignorance, unfounded fears of racial, ethnic, religious, cultural and linguistic or other forms of difference, the exploitation of prejudices, or the teaching or dissemination of distorted values. A reliable and enduring antidote to all of these failings is the provision of education which promotes an understanding and appreciation of the values [of the aims of education], including respect for differences, and challenges all aspects of discrimination and prejudice. Education should thus be accorded one of the highest priorities in all campaigns against the evils of racism and related phenomena. Emphasis must also be placed upon the importance of teaching about racism as it has been practised historically, and particularly as it manifests or has manifested itself within particular communities.[24]

The aims of education, finally, stress that a holistic approach to education must be followed. This is an approach which ensures that there is a bal-

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outputs". Note may also be taken of the view of Bitensky, 1994, p. 141, who holds that the requirement that education be directed to the full development of the human personality entails acceptance of an education right encompassing high standards.

[22] General Comment No. 1, see note 18, para. 9.

[23] *Ibidem* at para. 10.

[24] *Ibidem* at para. 11.

ance between the physical, mental, spiritual and emotional aspects of education. Only a holistic approach to education guarantees that the child's ability to participate fully and responsibly in a free society is maximised. It should be noted in this regard that "the type of teaching that is focused primarily on accumulation of knowledge, prompting competition and leading to an excessive burden of work on children, may seriously hamper the harmonious development of the child to the fullest potential of his or her abilities and talents".[25] Education must be child-friendly. This means that schools should foster a humane atmosphere.

3.2. *The Continuing Relevance of the Aims of Education in Article 13(1) Second and Third Sentence ICESCR*

The aims of education in article 13(1) second and third sentence remain topical. At the same time, however, it should be observed that there have been new developments in the sphere of the educational aims. As these are not reflected by the text of article 13, the catalogue of aims of that provision is somewhat outdated. The CESCR has, therefore, commented as follows:

> The Committee notes that since the General Assembly adopted the Covenant in 1966, other international instruments have further elaborated the objectives to which education should be directed. Accordingly, the Committee takes the view that States parties are required to ensure that education conforms to the aims and objectives identified in article 13(1), as interpreted in the light of the World Declaration on Education for All (Jomtien, Thailand, 1990) (art. 1),[26] the Convention on the Rights of the Child (art. 29(1)),[27] the Vienna Declaration and Programme of Action (Part I, para. 33 and Part II, para. 80),[28] and the Plan of Action for the United Nations Decade for Human Rights

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[25] *Ibidem* at para. 12.

[26] Art. 1(1) of the World Declaration on Education for All states *inter alia* that education must teach individuals how "to be able to survive, to develop their full capacities, to live and work in dignity, to participate fully in development, to improve the quality of their lives, to make informed decisions, and to continue learning".

[27] Art. 29(1) CRC is cited at 4.5.2. *supra*. Art. 29(1) essentially repeats the aims of education in art. 13(1) second and third sentence ICESCR, adds, however, that education must develop the child's respect for various persons/states/cultures (art. 29(1)(c)) and that it must further develop his respect for the natural environment (art. 29(1)(e)).

[28] Para. 33 in Part I of the Vienna Declaration and Programme of Action stresses that education must be aimed at strengthening the respect of human rights and fundamental freedoms and that human rights education should be integrated in the educational policies at the national and international levels. Para. 80 in Part II states that "[h]uman rights education should include peace, democracy, development and social justice, as set forth in international and regional human rights instruments, in order to achieve common understanding and awareness with a view to strengthening universal commitment to human rights".

Education (para. 2).[29] While all these texts closely correspond to article 13(1) of the Covenant, they also include elements which are not expressly provided for in article 13(1), such as specific references to gender equality and respect for the environment.[30] These new elements are implicit in, and reflect a contemporary interpretation of article 13(1). The Committee obtains support for this point of view from the widespread endorsement that the previously mentioned texts have received from all regions of the world.[31]

3.3. *The Individualistic or Social Nature of the Aims of Education in Article 13(1) Second and Third Sentence ICESCR*

The aims of education in article 13(1) second and third sentence may be divided into two groups. The first group comprises those educational aims which are related to the full development of the human personality. These aims are *individualistic* in nature.[32] Their focus is the development of the individual. The second group comprises the aims of strengthening respect for human rights and fundamental freedoms, promoting understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and furthering the activities of the United Nations for the maintenance of peace. These aims are *social* in nature.[33] They indicate how individuals and groups should behave towards other individuals and groups, who/which may be of different racial, ethnic or religious origin. The educational aim, in terms of which education should enable all persons to participate effectively in a free society, is more difficult to classify. On the one hand, it is directed at the development of the individual, but, on the other, it contains a social component, as it envisages that the individual should play a useful role in society.

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[29] Para. 2 of the Plan of Action for the United Nations Decade for Human Rights Education (1995–2004) repeats the aims of education in art. 13(1) second and third sentence ICESCR. It also mentions, however, that education must promote gender equality and it adds "indigenous peoples", "national groups" and "linguistic groups" to the list of those among whom understanding, tolerance and friendship are to be promoted.

[30] The ComRC, in its General Comment No. 1, see note 18, para. 13, has remarked that "for the development of respect for the natural environment, education must link issues of environmental and sustainable development with socio-economic, socio-cultural and demographic issues. Similarly, respect for the natural environment should be learnt by children at home, in school and within the community, encompass both national and international problems, and actively involve children in local, regional or global environmental projects".

[31] General Comment No. 13, see note 2, para. 5.

[32] Gebert, 1996, pp. 321–322 describes these aims of education in German as "*individualethische Bildungsziele*".

[33] Gebert, 1996, pp. 321–322 describes these aims of education in German as "*sozialethische Bildungsziele*".

3.4. *The Legally Binding Character of the Aims of Education in Article 13(1) Second and Third Sentence ICESCR*

The aims of education in article 13(1) second and third sentence have often been described as principles of a merely declaratory nature. Already at the time of drafting the ICESCR, countries such as Great Britain[34] and France[35] doubted the legally binding character of the aims, and argued that they were more in the nature of principles contained in a preamble. This view may perhaps be ascribed to the fact that the aims of education in article 13(1) second and third sentence introduce the various guarantees of article 13 like a preamble. It is also so that some of the aims have been inspired by the preambles of the UDHR, the ICCPR and the ICESCR. The preambles of all these instruments refer to "the inherent dignity of all members of the human family", "universal respect for and observance of human rights and fundamental freedoms" and the need for "peace in the world". The UDHR also refers to "the development of friendly relations between nations".

It is not acceptable, however, to regard the aims of education in article 13(1) second and third sentence as not legally binding.[36] Firstly, they do not form part of the preamble but of a material provision of the Covenant and, therefore, enjoy the same legal status as material provisions of the Covenant. Secondly, the *travaux préparatoires* of the Covenant show that the decision to include the aims of education in article 13 was a deliberate one. It was considered that the right to education should not remain restricted to its institutional side, but that it should also bind states parties to ensure that the content of education fulfils certain standards. Thirdly, the practice of the CESCR reveals quite clearly that the Committee perceives the aims of education to be of a legally binding character.[37] In its Concluding Observations, the Committee has in many instances expressed its concern at the insufficient realisation of the aims of education,[38] and, in General Comment No. 13, the Committee states under the heading "specific legal obligations":

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[34] See UN Doc. A/C.3/SR.783, para. 48.

[35] See UN Doc. E/CN.4/SR.286, p. 11.

[36] See the arguments adduced by Gebert, 1996, pp. 324–326 in support of regarding the aims of education in art. 13(1) second and third sentence ICESCR as legally binding.

[37] It is rather odd, however, that the CESCR's reporting guidelines (see UN Doc. E/C.12/1991/1) contain no questions concerning the aims of education in art. 13(1) second and third sentence ICESCR. The questions of the reporting guidelines formulated with regard to arts. 13 and 14 ICESCR are cited at 8.4.2. *supra*. In contrast, the ComRC's reporting guidelines (see UN Doc. CRC/C/58) do contain questions concerning the aims of education in art. 29(1) CRC. See VII.B. of the reporting guidelines.

[38] See 11.2.3. *infra*.

> States parties are required to ensure that curricula, for all levels of the educational system, are directed to the objectives identified in article 13(1). They are also obliged to establish and maintain a transparent and effective system which monitors whether or not education is, in fact, directed to the educational objectives set out in article 13(1).[39]

3.5. *The Meaning of the Different Aims of Education in Article 13(1) Second and Third Sentence ICESCR*

3.5.1. *The Full Development of the Human Personality*

The *travaux préparatoires* of the ICESCR demonstrate that "the full development of the human personality" was understood to be the most important aim of education.[40] It is probably for this reason that the said aim was mentioned first in article 13(1). Also the CESCR deems it the most important aim of education. In General Comment No. 13, the Committee states that of the aims of education "perhaps the most fundamental is that 'education shall be directed to the full development of the human personality'".[41] There is a sound explanation for regarding "the full development of the human personality" as the prime objective of education. In the words of Mustapha Mehedi:

> The explicit consensus . . . regarding the desirability of directing education primarily to personal development does not mean to say that the other objectives, more social in nature, should be disregarded. Nevertheless, this priority does appear to imply that social objectives should themselves serve the person, who can only be fulfilled if placed in an environment where human rights are respected for and therefore by that person. If education is supposed to enable the educated person to "play a useful role in society", it is because such a role is useful to persons and to their development and not "for the sake of" society as an abstract entity.[42] . . . *This clear emphasis on the primacy of the person must therefore act as a safeguard against the often dreaded tendencies of an educational approach directed exclusively at serving a social body or in extreme cases an ideology.*[43]

Whereas the importance of the educational objective of "the full development of the human personality" is clear, its content is rather imprecise. The implication of this aim appears to be that education must provide all those educational opportunities necessary for the development of all dimen-

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[39] General Comment No. 13, see note 2, para. 49.
[40] See, for example, UN Docs. E/CN.4/SR.288, pp. 7 *et seq.*, A/C.3/SR.782, para. 38 and A/C.3/SR.783, para. 66.
[41] General Comment No. 13, see note 2, para. 4.
[42] Mehedi, 1999b, para. 23 (UN Doc. E/CN.4/Sub.2/1999/10).
[43] *Ibidem* at para. 24. This author's italics.

sions of the human personality—physical, intellectual, spiritual, psychological and social. In other words, education must not be limited to the transmission of academic knowledge. The goal is rather that every person should be able to develop *all* aspects of his personality to the best of his abilities and talents, to become a harmonious person.[44]

3.5.2. *The Full Development of the Sense of Dignity of the Human Personality*

The aim of "the full development of the sense of dignity of the human personality" features only in the ICESCR and has not been included in other human rights instruments. In terms of the preambles of the UDHR, the ICCPR and the ICESCR, ". . . recognition of the inherent dignity . . . of all members of the human family is the foundation of freedom, justice and peace in the world . . .". Human dignity is thus seen as the source of human rights. The inclusion of "the full development of the sense of dignity of the human personality" as an aim of education in article 13(1) seems to require, therefore, that education should make the individual aware of his own inherent worth and of the human rights which accrue to him on this basis.[45]

3.5.3. *Effective Participation in a Free Society*

It is rather difficult to determine the content of the aim of "effective participation in a free society". This aim of education appears to require that education should not solely be theoretically oriented, but that it should also teach the individual how to satisfy his practical needs in life. It should be pointed out, however, that this aim has been framed in a way which suggests that the individual should be educated to satisfy such needs, not so much for his own sake, but for that of society. The reference to individual freedom as the basis of a socially responsible life is not clear enough. Jost Delbrück thus remarks:

> [O]ne would be hard put to find any express reference to the value of a broad education with regard to the exercise of *individual freedom* as the *basis of a socially responsible life in a free society*. To be sure, the phrase in Article 13 of the UN Covenant on Economic, Social and Cultural Rights that "education shall enable all persons to participate *effectively* in a free society" comes close to this fundamental aspect of education. But the phrase still seems to have a certain "instrumental" ring in that it speaks of "effective" participation

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[44] See Arajärvi, 1992, p. 409.

[45] Making the individual aware of his own inherent worth is indispensable before education can "strengthen the respect for human rights and fundamental freedoms", another aim of education in art. 13(1) ICESCR.

in a free society, and it does not refer to the *individual* as the focal subject, but rather to collectivities like "all persons" and "society".[46]

3.5.4. *Strengthening Respect for Human Rights and Fundamental Freedoms; Promoting Understanding, Tolerance and Friendship among All Nations and All Racial, Ethnic or Religious Groups; and Furthering the Activities of the United Nations for the Maintenance of Peace*

These three aims of education may be discussed together, as there are many points of contact among them. All three reflect fundamental purposes of the UN, laid down in article 1 UN Charter. Article 1(1) UN Charter refers to the maintenance of international peace and security, article 1(2) to the development of friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and article 1(3) to respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion. The concept of "human rights education" is often used to include all three of these educational aims.

The ComRC's General Comment No. 1 sheds some light on the meaning of "human rights education".[47] "Human rights education" should provide information on the content of human rights treaties. But, this is not enough. Children should also learn about human rights by seeing human rights standards implemented in practice in schools.[48] "Human rights education" is relevant to children living in zones of peace, but it is even more important for children living in situations of conflict or emergency. In such situations, "educational programmes [should] be conducted in ways that promote mutual understanding, peace and tolerance, and that help to prevent violence and conflict". Education about international humanitarian law also constitutes an important dimension of "human rights education".[49]

The concept of "human rights education" has also been concretised by the Recommendation concerning Education for International Understanding, Co-operation and Peace and Education relating to Human Rights and Fundamental Freedoms, adopted by UNESCO in 1974,[50] and by a number of documents adopted subsequently, which interpret and update the Recommendation, namely, the World Plan of Action on Education for

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[46] Delbrück, 1992, p. 100.
[47] See also Amor, 2001, paras. 116–120 (UN Doc. A/CONF.189/PC.2/22).
[48] General Comment No. 1, see note 18, para. 15.
[49] *Ibidem* at para. 16.
[50] See, in particular, sects. 4, 5 and 6 of the Recommendation concerning Education for International Understanding, Co-operation and Peace and Education relating to Human Rights and Fundamental Freedoms.

Human Rights and Democracy, the Vienna Declaration and Programme of Action, the Declaration and Integrated Framework of Action on Education for Peace, Human Rights and Democracy, and the Plan of Action of the United Nations Decade for Human Rights Education (1995–2004). As the various instruments have been discussed in Chapter 6 above,[51] the following remarks will suffice at this point: The concept of "human rights education" in these instruments, in fact, means "international/global education". The said instruments envisage that such education should lay the foundation for the emergence of a global community, in which individuals and groups feel solidarity with each other. This means that "human rights education" will have to extend beyond "human rights" as a separate subject as part of the curriculum. Rather, the general learning environment in schools must be imbued with human rights values. The ComRC states that "[h]uman rights education should be a comprehensive, lifelong process and start with the reflection of human rights values in the daily life and experiences of children".[52] This is to ensure that these values become an integral part of each individual's personality. This must, in turn, enable the individual to contribute himself to the promotion of respect for human rights, as required under the preamble of the UDHR.[53]

3.6. *The Implementation of the Aims of Education in Article 13(1) Second and Third Sentence ICESCR*

The aims of education in article 13(1) second and third sentence are primarily addressed to the legislative and administrative organs of government. These organs must ensure that the educational aims are implemented in the national education system. What exactly is expected of the organs concerned in this regard, may be gleaned from the ComRC's General Comment No. 1. Paragraphs 17 to 28 General Comment No. 1, which concern the "implementation, monitoring and review" of the educational aims, set out the following state obligations:

- States parties must take the necessary steps to formally incorporate the aims of education into their education policies and legislation. (See paragraph 17.)
- States parties must fundamentally rework curricula and systematically revise textbooks, teaching materials and school policies to include the various aims of education. Teachers and educational administrators, who

[51] See 6.2.2.4. *supra.*
[52] General Comment No. 1, see note 18, para. 15.
[53] Generally, see Gebert, 1996, pp. 332–335.

are expected to promote the aims of education, must further be convinced of their importance by means of pre-service and in-service training schemes. The teaching methods used in schools must also reflect the aims of education. (See paragraph 18.)

- States parties must ensure that the school environment itself reflects the spirit of the aims of education. A school which allows bullying or other violent and exclusionary practices to occur does not meet the requirements of the aims of education. Formal human rights education needs to be supplemented by the promotion of human rights values within schools and universities. (See paragraph 19.)
- States parties must secure the widespread dissemination of the text of the convention, as this will facilitate the role of children as promoters and defenders of their rights in their daily lives at school. (See paragraph 20.)
- States parties must encourage the mass media to promote the values reflected by the aims of education and to ensure that their activities do not undermine the efforts of others to promote those aims. (See paragraph 21.)
- States parties must devise means by which to measure changes over time concerning the implementation of the aims of education. Of importance in this regard are "surveys that may provide an opportunity to assess the progress made, based upon consideration of the views of all actors involved in the process, including children currently in or out of school, teachers and youth leaders, parents, and educational administrators and supervisors". (See paragraph 22.)
- States parties must develop a comprehensive national plan of action to promote and monitor realisation of the aims of education. (See paragraph 23.)
- States parties must, as a standard response to all situations in which patterns of human rights violations have occurred, for example, major incidents of racism, design and implement suitable educational programmes to promote the values of the aims of education. (See paragraph 24.)
- States parties must consider establishing a review procedure which responds to complaints that existing policies or practices are not consistent with the aims of education. Such review procedures need not necessarily entail the creation of new legal, administrative or educational bodies, but may also be entrusted to national human rights institutions or to existing administrative bodies. (See paragraph 25.)
- States parties must, in their periodic reports, provide a detailed indication of what they consider priorities concerning the promotion of the values of the aims of education, and outline the programme of activi-

ties they propose to take over the succeeding five years to address the problems identified. (See paragraph 26.)
- States parties must, with a view to the implementation of the aims of education, make available human and financial resources to the maximum extent possible. Resource constraints do not provide a justification for a state party's failure to take any, or enough, of the measures that are required. States parties providing development co-operation must ensure that their programmes are designed so as to take full account of the aims of education. (See paragraph 28.)

But, in appropriate cases, the aims of education in article 13(1) second and third sentence may also give rise to individual claims which are judicially enforceable.[54] The aims of education are justiciable to the extent that they entail *obligations to respect*. This means that an individual should be able to approach a court for a finding that totalitarian tendencies in education, which leave no room for the development of the individual's personality, infringe the educational aim of "the full development of the human personality", or for a finding that educational materials which propagate racism infringe the educational aim of "promoting understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups". In these instances, a judge would be competent to issue an injunction which prohibits the use of dehumanising teaching methods or educational materials which incite racial hatred. The justiciability of the aims of education is more limited, however, with regard to *obligations to fulfil* flowing from the educational aims. Claims, based on the one or other aim of education, in terms of which the state should pursue a particular form of development of the education system, are not judicially enforceable. Positive duties should be enforceable against the state, however, where they do not entail far-reaching decisions concerning state resources. This would, for example, cover the claim that the curriculum should in one form or another contain "human rights education", or that it should explain the role of the UN in maintaining international peace and security.

4. *Article 13(2) ICESCR: The Social Aspect of the Right to Education*

Article 13(2) ICESCR protects the social aspect of the right to education. In terms of article 13(2)(a) to (e), states parties must ensure that primary

[54] On the justiciability of the aims of education in art. 13(1) second and third sentence ICESCR, see Gebert, 1996, pp. 326–327.

education is compulsory and free to all, make secondary education generally available and accessible to all, make higher education equally accessible to all, on the basis of capacity, encourage or intensify fundamental education as far as possible, and develop a system of schools at all levels, establish a fellowship system and improve the material conditions of teaching staff. States parties are expected to allocate "maximum resources" in this respect. The obligations under article 13(2) are generally of a progressive nature. Before analysing article 13(2)(a) to (e), however, the idea that education, at all levels, must be available, accessible, acceptable and adaptable, will be discussed.

4.1. *Making Education Available, Accessible, Acceptable and Adaptable*

Article 13(2) ICESCR protects the right *to* education. In Chapter 4, it has been stated that this entails a right to education at the different levels, which is available and accessible to varying degrees at these levels.[55] It is increasingly recognised, however, that article 13(2) should also be read as protecting rights *in* education. In this context, it is then stated that education must further be acceptable and adaptable at each educational level. The 4-A scheme (in terms of which education must be available, accessible, acceptable and adaptable) for studying the obligations in article 13(2) has been developed by Katarina Tomaševski, former Special Rapporteur of the Commission on Human Rights on the Right to Education.[56] The scheme has subsequently been endorsed by the CESCR. Paragraph 6 General Comment No. 13 states that "education in all its forms and at all levels shall exhibit the following interrelated and essential features: (a) *Availability* . . .; (b) *Accessibility* . . .; (c) *Acceptability* . . .; (d) *Adaptability* . . .".[57] To read article 13(2) widely as additionally protecting the criteria of "acceptability" and "adaptability" with regard to the different levels of education is justifiable. The said reading may be justified as an interpretation of article 13(2) in the light of article 13(1), which, as has been argued above,[58]

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[55] See 4.3.2. *supra.*

[56] See the following reports of the former Special Rapporteur of the Commission on Human Rights on the Right to Education: Preliminary Report of 13 January 1999 (Tomaševski, 1999a, paras. 42–74, UN Doc. E/CN.4/1999/49), Progress Report of 1 February 2000 (Tomaševski, 2000a, paras. 30–65, UN Doc. E/CN.4/2000/6), Annual Report of 9 January 2001 (Tomaševski, 2001a, paras. 64–77, UN Doc. E/CN.4/2001/52) and Annual Report of 7 January 2002 (Tomaševski, 2002a, paras. 27–29, UN Doc. E/CN.4/2002/60). See further Tomaševski, 2001c, Tomaševski, 2001e and Tomaševski, 2001d.

[57] Para. 7 General Comment No. 13, see note 2, states that "[w]hen considering the appropriate application of these 'interrelated and essential features' the best interests of the student shall be a primary consideration".

[58] See 10.2. *supra.*

should be seen as an open-ended fundamental norm in the sphere of education. In what follows, the 4-A scheme will be analysed, relying primarily on the reports which the former Special Rapporteur has produced, and on General Comment No. 13. First of all, however, a diagrammatic overview of the scheme will be provided. It already shows that the application of the 4-A scheme to article 13(2) promises to facilitate a holistic understanding of the right to education.

State obligations under article 13(2), presented as obligations to make education available, accessible, acceptable and adaptable:

the right to education	availability	schools: • Schools must be established. • Schools must not be closed. • The right to establish and direct private schools must be guaranteed. • States parties must not neglect the public education system (attention to issues concerning the funding of public and private schools). teachers: • Teachers must be made available. • Teachers must be properly qualified. • The labour and trade union rights of teachers must be guaranteed. • Academic freedom and institutional autonomy must be ensured.
	accessibility	• Education must be accessible without discrimination. • Education must be physically accessible. • Education must be economically accessible (at the primary level it must be free, at the other levels it must be made progressively free).
rights in education	acceptability	• The state must set and enforce minimum standards in education concerning, for example, quality, safety and health. • The right of parents to ensure their children's religious and moral education in conformity with their own convictions must be respected. • The opportunities for instruction in the mother tongue must be maximised.

	• The methods of instruction, the contents of textbooks and teachers' conduct must respect human rights values. • All aspects of school discipline must be consonant with the individual's dignity and his human rights. • The learner must be recognised to be the bearer of rights.
adaptability	Education must be flexible so that it can adapt to: • the needs of a constantly changing society, notably those flowing from the opposing pressures of globalisation and localisation; • the educational needs of minority and indigenous communities; • the special situation of disabled children; and • the special situation of working children.

4.1.1. *Availability*

Paragraph 6 General Comment No. 13[59] describes state obligations with regard to the criterion of the "availability" of education as follows:

> [F]unctioning educational institutions and programmes have to be available in sufficient quantity within the jurisdiction of the State party. What they require to function depends upon numerous factors, including the developmental context within which they operate; for example, all institutions and programmes are likely to require buildings or other protection from the elements, sanitation facilities for both sexes, safe drinking water, trained teachers receiving domestically competitive salaries, teaching materials, and so on; while some will also require facilities such as a library, computer facilities and information technology.

Education must be made available at all levels of education. In Chapter 4, it has been shown that whereas primary and secondary education must be made generally available, the requirement of availability is not equally strict for higher and fundamental education.[60] In other words, whilst, in the case of primary and secondary education, schools, teachers and teaching materials must be made available to all, in the case of higher and fundamental education, schools, teachers and teaching materials must be made available to as many persons as possible.

[59] See note 2.
[60] See 4.3.2. *supra.*

The criterion of the "availability" of education broadly encompasses two aspects: the availability of *schools* and the availability of *teachers*. Each of these aspects will now be addressed.

4.1.1.1. *The availability of schools, and issues concerning the funding of public and private schools*

States parties are obliged to build and equip schools. To determine the scope of their obligation in this regard, states parties will, as a first step, have to ascertain the number of prospective students, as the intake capacity of schools must be based on this figure. This in turn requires states parties to maintain an effective birth registration system. This is, in fact, expected by article 24(2) ICCPR and article 7(1) CRC, which direct states parties to register every child immediately after birth.[61] The Special Rapporteur on the Right to Education has emphasised that schools must be "really rather than nominally available".[62] This means that schools must be in such a condition that teaching and learning can take place in a meaningful manner. The Special Rapporteur refers to a UNESCO/UNICEF pilot survey of primary schools in the least developed countries, which has revealed that electricity or piped water is the exception rather than the rule, and that many children finish primary school without ever having seen a single textbook in their mother tongue.[63] States parties must further not close schools without justifiable reason. The failure of states parties to sustain available schooling constitutes a violation of the right to education.[64] The African Commission on Human and Peoples' Rights has thus found that a two-year-long closure of secondary schools and universities in the former Zaire constituted a violation of article 17 African Charter on Human and Peoples' Rights, which protects the right to education.[65] The duty to make education available also entails that states parties must respect the right of individuals and bodies to establish and direct private schools.

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[61] Tomaševski, 2000a, para. 11 (UN Doc. E/CN.4/2000/6) shows that less than 50 per cent of children are registered in some countries whilst no birth registration systems exist at all in others.

[62] Tomaševski, 1999a, para. 52 (UN Doc. E/CN.4/1999/49).

[63] See Schleicher, A. *et al.*, *The conditions of primary schools: A pilot study in the least developed countries: A report to UNESCO and UNICEF*, Paris: UNESCO, 1995.

[64] See Tomaševski, 2000a, para. 32 (UN Doc. E/CN.4/2000/6).

[65] *Free Legal Assistance Group, Lawyers Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Témoins de Jehovah v. Zaire*, Communications 25/89, 47/90, 56/91 and 100/93 (joined), Decision of the African Commission on Human and Peoples' Rights, adopted at its 18th Ordinary Session at Prais, Cape Verde, *Ninth Annual Activity Report of the African Commission on Human and Peoples' Rights 1995/96, Assembly of Heads of State and Government, Thirty-Second Ordinary Session, 7–10 July 1996, Yaounde, Cameroon*.

The obligation to ensure the availability of schools involves an obligation for states parties to operate and fund a network of public schools. States parties are free to decide whether they favour a school system comprising primarily public schools, financed and operated by the state, or a system relying to a significant extent on the educational services of private schools, possibly subsidised by the state, but operated privately, and subject to state supervision aimed at securing compliance with certain minimum standards. It should be appreciated, however, that in the same way that a state's monopoly over education would violate international human rights law, so would its dissociation from public education.[66] States parties must, therefore, at all times ensure that there is a system of public schools, funded by the state, which is devoted to free education of a high quality, which guarantees access without discrimination and which fully respects all of the child's human rights.

It is in this context that a few words should be said on so-called school voucher schemes. School voucher schemes have been resorted to in countries such as the USA, in an attempt to deal with problems related to the deterioration of the public education system. The standard scheme in the USA entails the distribution of monetary vouchers (typically valued between US$2 500–US$5 000) to parents of school-aged children, usually in troubled inner-city or rural school districts. Parents can then use the vouchers towards the cost of tuition at private schools, including religious schools. Supporters of school vouchers have argued that vouchers broaden freedom of choice for poor parents, who can send their children to good private schools rather than have them go to mediocre public schools.

School voucher schemes are highly problematic, however, because they tend to undermine the system of public education.[67] Underlying the idea of education as a human right is the notion that education is a public good for which the state bears responsibility. A state which implements a school voucher scheme rather fails to comply with this responsibility for a number of reasons:

- School voucher schemes cost enormous sums of money, which are thus taken away from public schools.
- School voucher schemes divert attention from much-needed reforms of the public education system.
- School voucher schemes decimate public education, and have the effect of commoditising education, subjecting it to the rules of the marketplace.

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[66] See Tomaševski, 2000a, para. 33 (UN Doc. E/CN.4/2000/6).
[67] For critical comments on school voucher schemes, see *ibidem* at paras. 38–41.

The emphasis is on the ability of schools to attract learners and funding. The relevance and quality of educational programmes and respect for human rights in schools become secondary issues.
- Voucher schools (in the USA) do not have to abide by open meetings and records laws, nor administer state tests nor even provide information of students.
- Voucher schools (in the USA) do not have to provide special services to students with disabilities or students who do not speak English as their first language.
- Voucher schools (in the USA) often do not honour basic rights, such as free speech and due process, and often discriminate on the basis of race, sex, sexual orientation or pregnancy.

The alternative to school voucher schemes is to build a quality public education system for all children. The focus should be upon proven programmes, such as improved teacher training, ongoing staff development, smaller classes, multicultural curricula, and adequate resources for all children in all schools.[68]

School voucher schemes may further be a problem in states, whose constitutions prescribe a strict separation of state and church.[69] The US Constitution, for example, prescribes such a separation. If it is now considered that the majority of vouchers in the USA are used in religious schools, including those dedicated to religious indoctrination, it might be argued that vouchers in the US violate the mandate of separation, because public tax money is being diverted to religious institutions. Nevertheless, the US Supreme Court has recently held otherwise. In the case of *Zelman, Superintendent of Public Instruction of Ohio*, et al. *v. Simmons-Harris* et al., decided on 27 June 2002, the Supreme Court examined the constitutionality of a Cleveland voucher scheme.[70] The question to be decided was whether the scheme violated the constitutional principle of the separation of state and

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[68] It is interesting in this context to take note of the decision of the Supreme Court of Puerto Rico in the case of *Asociación de Maestros v. José Arsenio Torres*, Tribunal Supremo de Puerto Rico, 30 November 1994, 94 DTS 12:34. The Court in this case declared the voucher scheme introduced in 1993 in Puerto Rico unconstitutional in the part which accorded to certain students a financial grant to transfer from public to private school. The Court decided that the scheme was contrary to the prohibition under the Puerto Rican constitution of diverting public funds to private education.

[69] As will be shown at 10.5.1.3.3.1. *infra*, however, a separation of state and church is not required by international law.

[70] *Zelman, Superintendent of Public Instruction of Ohio*, et al. *v. Simmons-Harris* et al., US Supreme Court, Judgement of 27 June 2002, available on the website of the Supreme Court of the United States at www.supremecourtus.gov. In terms of the Cleveland voucher scheme, public tax money was used to pay for tuition vouchers of up to US$2 250 at private schools. In 2002, vouchers were given to 4 266 students, most of whom were low income and 99,4 per cent of whom attended religious schools.

church. The Court held that because the money passed through an individual who made a free choice whether or not to use that money at a religious school, and because there was an array of religious and non-religious choices, the scheme did not violate the stated principle. It should be noted, though, that the Court did not deal with the matter from the perspective of whether massive state funding for private education, which may have detrimental consequences for the public education system, is constitutionally assailable. Even so, the Court's decision must be seen as a serious blow to supporters of public education in the USA.[71]

The mobilisation and allocation of resources, required for the performance of public functions, is a political issue. Decisions on resources should thus be taken by elected parliamentarians rather than unelected judges. This does not mean, however, that the financing of education and other social services should be completely beyond the remit of courts, as it is in many states, also the USA. In the case of *San Antonio Independent School District v. Rodriguez*,[72] the US Supreme Court declared taxation as well as economic and social policy to lie beyond the purview of the Court. *In casu*, the Court refrained from adjudicating on the financing of education at the district level out of property tax, which had caused considerable differences between rich and poor districts. It is submitted that, although the state must hold a wide discretion when formulating fiscal policies, domestic courts should be competent to enquire whether such policies respect fundamental human rights. Thus, courts should be able to scrutinise funding systems for education and ascertain whether they respect the right to education, including the state's duty to maintain high-quality public education.[73]

4.1.1.2. *The availability of teachers, and academic freedom and institutional autonomy*

The second aspect of the availability of education relates to the duty of states parties to ensure the availability of teachers. This is and will remain an important obligation for states parties. The Special Rapporteur on the Right to Education has stated that

> [she] is not convinced that recent ideas about replacing humans by technological devices will ever materialise, nor that they would be beneficial if they do materialise. For schooling that takes place without a school, water, sanitation, desks and chairs, books, blackboards, pens and paper, a teacher makes all the difference and the absence of a teacher prevents teaching from taking

[71] For more information on voucher schemes in the USA, see the website of the education resource "RethinkingSchools" at www.rethinkingschools.org.

[72] 411 U.S. 1 (1973).

[73] To the same effect, see Tomaševski, 2001e, pp. 20–21.

> place. For teenagers in OECD countries who have replaced socialisation by surfing the web, the Special Rapporteur has not seen a single piece of evidence claiming benefits for their social skills, tolerance or even basic literacy.[74]

Teachers must be properly qualified to teach. This includes perfect command of the language in which they must teach. The Human Rights and Equal Opportunity Commission of Australia has thus stated with the teaching profession in mind:

> [T]here are types of employment where an ability to communicate in an effective and unrestricted manner in English or some other specific language is an essential aspect of adequate and effective performance of the requirements of the job. In such a case, discrimination on the basis of an inability effectively to communicate in English which may be related to knowledge of language or may be related to a very noticeable accent will not be characterised as making a distinction on the basis of race or ethnic or national origin even though there is a causal link between the person having grown up in a particular country or region and even though that is a common characteristic of people of those ethnic or racial origins.[75]

The labour and trade union rights of teachers must further be guaranteed. Teachers must thus earn a salary which is commensurate with their status. They must also be held to be entitled to take strike action in support of their industrial demands, seeing that they do not fall within the definition of essential services or public servants acting on behalf of the public authorities.[76] It has even been held that teachers "should be able to have recourse to protest strikes, in particular where aimed at criticising a government's economic and social policies".[77]

States parties must further ensure academic freedom and institutional autonomy. Present international law largely neglects this important topic.[78]

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[74] Tomaševski, 2000a, para. 42 (UN Doc. E/CN.4/2000/6).

[75] *D'Souza v. Geyer and Directorate of School Education Victoria*, Human Rights and Equal Opportunity Commission of Australia, No. H94/100, 25 March 1996, para. 115. See also *T. v. Department of Education, State of Victoria*, Human Rights and Equal Opportunity Commission of Australia, No. H96/149, 21 July 1997. In each of these cases, a teacher had unsuccessfully complained that he had been exposed to racial discrimination, *inter alia*, on the ground of his Indian accent.

[76] See, *e.g.*, *Complaint against the Government of Peru presented by the World Confederation of Organisations of the Teaching Profession (WCOTP)*, Freedom of Association Committee (ILO), Case No. 1503, Report No. 272 (May 1990), para. 117 and *Complaint against the Government of Germany presented by the German Confederation of Trade Unions (DGB) and the Educational and Scientific Trade Union (GEW)*, Freedom of Association Committee (ILO), Case No. 1528, Report No. 277 (March 1991), para. 285. See also 6.3.1. *supra*.

[77] *Complaint against the Government of Guinea presented by the Trade Union of Workers of Guinea (USTG)*, Freedom of Association Committee (ILO), Case No. 1863, Report No. 304 (May 1996), para. 356.

[78] See Nowak, 1995b, pp. 209–210.

Neither of the international human rights Covenants contains explicit provisions on the topic. It has apparently been considered that academic freedom and institutional autonomy are sufficiently protected by the following Covenant provisions: article 18 ICCPR on the right to freedom of thought, conscience and religion, article 19 ICCPR on the right to hold opinions and the right to freedom of expression, article 21 ICCPR on the right of assembly, article 22 ICCPR on the right to freedom of association, article 9 ICCPR on the right to liberty and security of the person, article 12 ICCPR on the right to liberty of movement within a country and the right to leave any and to enter his own country, and article 15(3) ICESCR in terms of which states parties "undertake to respect the freedom indispensable for scientific research and creative activity".

The academic community has traditionally been a particularly vulnerable target of state repression. In view of this fact, World University Service (WUS) and other NGOs have for several years advocated the adoption of an international instrument on academic freedom and institutional autonomy on the basis of various non-governmental declarations.[79] Documents on the topic have also been prepared at conferences sponsored by UNESCO.[80] In 1995, UNESCO invited the International Association of Universities (IAU) to assess the feasibility, desirability and possible content of an International Charter on Academic Freedom and University Autonomy. The IAU concluded in 1998 that such a Charter was both feasible and desirable, that it could take the form of a normative instrument within the UNESCO system or a declaration recognised by the academic community alone or, in fact, both, and further that it should not contradict UNESCO's *Recommendation concerning the Status of Higher-Education Teaching Personnel* of

[79] The most influential NGO declaration has been the *Lima Declaration on Academic Freedom and Autonomy of Institutions of Higher Education*, adopted by World University Service (WUS), an international NGO focusing on education, development and human rights, at Lima, Peru in 1988. Others are the *Magna Charta of European Universities*, adopted by the Rectors of European Universities at Bologna, Italy in 1988, the *Dar es Salaam Declaration on Academic Freedom and Social Responsibility of Academics*, adopted by six academic staff associations of higher education institutions at Dar es Salaam, Tanzania in 1990, and the *Kampala Declaration on Intellectual Freedom and Social Responsibility*, adopted by the participants in the Symposium on "Academic Freedom and Social Responsibility of Intellectuals" at Kampala, Uganda in 1990. For the texts of the various declarations, see *Academic Freedom: Report from a Seminar on Academic Freedom*, 1992.

[80] Notable in this regard are the *Sinaia Statement on Academic Freedom and University Autonomy*, adopted by the Sinaia International Conference on Academic Freedom and University Autonomy at Sinaia, Romania in 1992, and the *Contributions to the Preparation of a Declaration on Academic Freedom*, adopted by the International Congress on Education for Human Rights and Democracy at Montreal, Canada in 1993. The draft declaration proposed at Montreal has been submitted, without success, to the General Conference of UNESCO in 1993. Its text is reproduced in Fernandez, 1998, pp. 47–49.

1997.[81] Figures V to VII of the Recommendation contain provisions on academic freedom and institutional autonomy and reflect the current international position on the topic.[82] The IAU's findings were subsequently presented at the World Conference on Higher Education: Higher Education in the Twenty-First Century: Vision and Action, convened by UNESCO and held at Paris, France from 5 to 9 October 1998. In the light of the findings, the Conference, in paragraph 14(e) of the *Framework for Priority Action for Change and Development in Higher Education*, adopted by the Conference, resolved to call upon UNESCO to "take the initiative and draw up an international instrument on academic freedom, autonomy and social responsibility in connection with the Recommendation concerning the Status of Higher-Education Teaching Personnel".

Article 13 ICESCR does not explicitly mention academic freedom and institutional autonomy. In paragraph 38 General Comment No. 13,[83] the CESCR states, however, that it considers the issue to be covered by article 13. In the same paragraph, the Committee also states that, although academic freedom is particularly relevant to institutions of higher education, as staff and students in higher education are especially vulnerable to political and other pressures which undermine academic freedom, "staff and students throughout the education sector are entitled to academic freedom".[84] In the Committee's view, academic freedom comprises the following:[85]

- the freedom of members of the academic community, individually or collectively, to pursue, develop and transmit knowledge and ideas, through research, teaching, study, discussion, documentation, production, creation or writing;
- the liberty of individuals to express freely opinions about the institution or system in which they work;
- the liberty of individuals to fulfil their functions without discrimination or fear of repression by the state or any other actor;

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[81] See the IAU's "Working Document: Analysis: The Feasibility and Desirability of an International Instrument on Academic Freedom and University Autonomy" of 1997 and its "Statement on Academic Freedom, University Autonomy and Social Responsibility" of 1998, both available on the website of the IAU at www.unesco.org/iau.

[82] The Recommendation, including its provisions on academic freedom and institutional autonomy, has been discussed in Chapter 6 above. See 6.2.2.3. *supra.*

[83] See note 2.

[84] Academic freedom, it should further be pointed out, is not only a right of teachers and researchers, but also of students. Para. 9 Lima Declaration on Academic Freedom and Autonomy of Institutions of Higher Education, see note 79, states, "All students of higher education shall enjoy freedom of study, including the right to choose the field of study from available courses and the right to receive official recognition of the knowledge and experience required".

[85] General Comment No. 13, see note 2, para. 39.

- the liberty of individuals to participate in professional or representative academic bodies;
- the liberty of individuals to enjoy all the internationally recognised human rights applicable to other individuals in the same jurisdiction;

but also

- obligations, such as the duty to respect the academic freedom of others, to ensure the fair discussion of contrary views, and to treat all without discrimination on any of the prohibited grounds.

The Committee further holds that the enjoyment of academic freedom requires the autonomy of institutions of higher education.[86] According to the Committee:

> Autonomy is that degree of self-governance necessary for effective decision-making by institutions of higher education in relation to their academic work, standards, management and related activities.

The Committee adds, however, that self-governance must be consistent with systems of public accountability, especially in respect of funding provided by the state.

The discussion of academic freedom and institutional autonomy may be concluded by referring to the case of *Adimayo M. Aduayom, Sofianou T. Diasso and Yawo S. Dobou v. Togo*, decided by the HRC in 1996.[87] *In casu*, two of the authors of communications were university teachers, who had been arrested and charged with the offence of *lèse-majesté* (*outrage au Chef de l'Etat dans l'exercise de sa fonction*) for having distributed/carried documents critical of Tongolese politics. In both instances, the charges were later dropped. Both authors were, however, subsequently refused reinstatement in their former posts, with the justification that they had deserted them. The HRC held that the actions of the state had violated article 19 ICCPR on the right to freedom of expression and information. It stated with regard to the said article:

> The Committee observes that the freedoms of information and of expression are cornerstones in any free and democratic society. It is in the essence of such societies that its citizens must be allowed to inform themselves about alternatives to the political system/parties in power, and that they may criticise or openly and publicly evaluate their Governments without fear of interference or punishment, within the limits set by article 19, paragraph 3.[88]

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[86] *Ibidem* at para. 40.

[87] *Adimayo M. Aduayom, Sofianou T. Diasso and Yawo S. Dobou v. Togo*, HRC, Communications Nos. 422/1990, 423/1990 and 424/1990, 19/08/1996, UN Doc. CCPR/C/57/D/422/1990.

[88] *Ibidem* at 7.4.

The HRC held that these rights also accrued to those in the public service. It stated that article 25(c), which protects every citizen's right to have access to the public service in his country,

> should also be read to encompass the freedom to engage in political activity individually or through political parties, freedom to debate public affairs, to criticise the Government and to publish material with political content.[89]

The HRC thus concluded that despite the fact that the university teachers in this case were part of the public service (the university having been state-controlled), they had the right to be politically active and to criticise the government. The Committee hence also found article 25(c) to have been violated. In sum, the HRC relied on articles 19 and 25(c) to protect the authors' academic freedom.

4.1.2. *Accessibility*

In terms of paragraph 6 General Comment No. 13,[90] educational institutions and programmes must be accessible to everyone, without discrimination. The criterion of the "accessibility" of education signifies that obstacles impeding admission to education must be eliminated. Obstacles may exist in the form of discrimination or be of a physical or economic nature. Paragraph 6 General Comment No. 13, therefore, considers "accessibility" to have three overlapping dimensions:

1. education must be accessible without discrimination;
2. education must be physically accessible; and
3. education must be economically accessible.

4.1.2.1. *Access without discrimination: The case of girls*

The obligation to ensure that education is *accessible without discrimination* entails that

> education must be accessible to all, especially the most vulnerable groups, in law and fact, without discrimination on any of the prohibited grounds.[91]

In other words, states parties are obliged to take measures not only against "active", but also against "static" discrimination in education. Measures must in particular be taken to promote the educational rights of disadvantaged groups in society. Non-discrimination must be guaranteed at all levels of education. As the topic of non-discrimination in education has been dealt

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[89] *Ibidem* at 7.5.
[90] See note 2.
[91] General Comment No. 13, see note 2, para. 6.

with at length above,[92] it will suffice at this point to make a few comments on the particular situation of girls concerning access to education.[93]

Girls are denied satisfactory access to education in many countries. In some cases, there is an outright prohibition on the admission of girls to educational institutions. "Active" discrimination of this nature clearly violates the right to education. The Commission on Human Rights has, therefore, condemned the categorical denial of education to girls in Afghanistan under the former Taliban regime, describing all forms of discrimination against women and girls in all areas of Afghanistan as "grave violations" of their human rights.[94] It urged the Afghan parties to ensure "[t]he right of women and girls to education without discrimination, the reopening of schools and the admission of women and girls to all levels of education".[95]

More often, however, discrimination against girls concerning access to education occurs in the form of "static" discrimination. Parents are often unwilling to send their daughters to school because of the absence of an economic rationale to invest in their daughters' education. In many societies, girls are required to perform household labour related to family life or subsistence food production, the families depending on the work of the girls for their survival. To address the problem, states parties would, therefore, have to create a demand for girls' education by providing economic incentives to parents. The Special Rapporteur on the Right to Education has thus argued that school and work in these cases would often have to be combined to make education really accessible for girls. The idea is that where girls are required to perform household work, "the school schedule has to be adapted to the seasonal and daily rhythm of subsistence food production or family life".[96] There are also other impediments to girls' access to education which need to be addressed. Early marriage and childbearing, prevalent in many societies, are often the main reasons for girls not continuing primary education. The Special Rapporteur has hence emphasised that overcoming these obstacles requires "a well-designed strategy for changing social norms through the mobilisation of teachers, par-

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[92] See 9.3. *supra*.

[93] Generally, on the situation of girls in education, see Tomaševski, 2001e, pp. 27–28, Tomaševski, 2003e, points 3.6., 4.4. and 7., Wilson, 2003 and Tomaševski, 2004a, paras. 31–34 (UN Doc. E/CN.4/2004/45). See also United Nations Children's Fund (ed.), *The State of the World's Children 2004: Girls, Education and Development*, New York: United Nations Children's Fund, 2003.

[94] Commission on Human Rights, Resolution 1999/9, 23 April 1999, Situation of human rights in Afghanistan, para. 5(b).

[95] *Ibidem* at para. 10(d).

[96] Tomaševski, 1999a, para. 60 (UN Doc. E/CN.4/1999/49). States parties may also pay subsidies to poor families to enable them to send girls to school. These should cover the opportunity costs of schooling in order to redress the inability of families to dispense with the contribution of girls to the survival of the family.

ents, community leaders, and pupils themselves".[97] In its General Comment No. 4 on adolescent health and development in the context of the CRC, the Committee on the Rights of the Child points out that "[b]oth the legal minimum age and actual age of marriage, particularly for girls, are still very low in several States parties" and that "children who marry, especially girls, are often obliged to leave the education system and are marginalised from social activities". The Committee strongly recommends that "States parties review and, where necessary, reform their legislation and practice to increase the minimum age for marriage with and without parental consent to 18 years, for both girls and boys".[98] Finally, it needs to be realised that measures to eliminate gender disparity in access to education, such as the obligation of schools to enrol a certain percentage of girls, will not yield sustainable results, if girls cannot profit from their education. The Special Rapporteur has thus remarked that "[w]hat girls can do with their education determines the attractiveness of schooling", stating that "[i]f women cannot be employed or self-employed, own land, open a bank account, get a bank loan, if they are denied freedom to marry or not to marry, if they are deprived of political representation, [as is the case in many countries,] education alone will have little effect on their plight".[99] States parties are, therefore, obliged to take all steps necessary to enable women to exercise all human rights and, consequently, to effectively use their education.

4.1.2.2. *Physical accessibility*

The obligation to ensure that education is *physically accessible* entails that

> education has to be within safe physical reach, either by attendance at some reasonably convenient geographic location (*e.g.* a neighbourhood school) or via modern technology (*e.g.* access to a "distance learning" programme).[100]

This means, for example, that states parties would in appropriate circumstances have to ensure the availability of transport to and from schools. The duty to ensure that education is physically available is more demanding

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[97] Tomaševski, 1999a, para. 61 (UN Doc. E/CN.4/1999/49).

[98] ComRC, General Comment No. 4 (Thirty-Third Session, 2003) Adolescent health and development in the context of the Convention on the Rights of the Child [*Compilation*, 2004, pp. 321–332], para. 20. Art. 16(2) CEDAW states, "The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory". The Committee on the Elimination of Discrimination against Women, in General Recommendation No. 21 (Thirteenth Session, 1994) Equality in marriage and family relations [*Compilation*, 2004, pp. 253–262], para. 36, considers that "the minimum age for marriage should be 18 years for both man and woman".

[99] Tomaševski, 2003e, point 3.

[100] General Comment No. 13, see note 2, para. 6.

than may be apparent at first sight. Creative strategies would thus have to be devised to make education accessible for children living in dispersed mountainous villages or for nomadic children.

4.1.2.3. *Economic accessibility*

Finally, the obligation to ensure that education is *economically accessible* entails that

> education has to be affordable to all. This dimension of accessibility is subject to the differential wording of article 13(2) in relation to primary, secondary and higher education: whereas primary education shall be available "free to all", States parties are required to progressively introduce free secondary and higher education.[101]

Free primary education does not imply, of course, that such education does not cost money, since schools and teachers must be financed. It only means that the duty to finance primary education should not be fully borne by parents, who, in fact, often cannot afford school fees. International law envisages another method of financing primary education. It has thus been stated:

> The duty to financially contribute to the cost of primary education is spread among the whole population where education is financed by the state out of general taxation, which is the model envisaged in international human rights law.[102]

Underlying the concept of ESCR is the idea that certain social services, such as basic health care and education, should be accessible to all, irrespective of one's ability to pay for these services. School fees rupture this principle, as they must be paid by all, thus denying access to education to those who cannot afford them. Rather, the means required to finance the said social services are to be generated through general taxation. General taxation exempts the poorest, *i.e.* those who do not earn enough to be liable to taxation. This ensures that no child is denied access to education because his parents cannot afford school fees. It may be asked whether access to primary education cannot also be assured to the children of poor families by granting exemptions from school fees in deserving cases. The Special Rapporteur on the Right to Education has argued that this does not really constitute an alternative, as exemptions are often too cumbersome to comply with or too expensive to administer.[103]

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[101] General Comment No. 13, see note 2, para. 6.

[102] Tomaševski, 2001c, p. 20. See also Tomaševski, 1999a, para. 35 (UN Doc. E/CN.4/1999/49) and Tomaševski, 2000a, para. 52 (UN Doc. E/CN.4/2000/6).

[103] See Tomaševski, 1999a, para. 35 (UN Doc. E/CN.4/1999/49).

To ensure free primary education, states parties are, therefore, obliged to generate sufficient resources through general taxation.[104] Generally, states whose tax revenue constitutes less than 10 per cent of their gross domestic product, are unable to realise free primary education (or any other ESCR for that matter).[105] Most states are able to impose and enforce taxation upon their population. Yet, many are unwilling to do so. This is largely the result of today's dominant ideology which "seeks the withdrawal of the state from generating and allocating resources, thus jeopardising access to education".[106] The consequence is that primary school fees are very much a reality in many countries. It has thus been shown that "household expenditures account for about 20 per cent of total spending on public primary education, with higher proportions in Africa (30 per cent) and in former socialist countries (approximately 40 per cent)".[107] This is regrettable and conflicts with the criterion of the "accessibility" of education.

To ensure free primary education and to make education progressively free at the secondary and higher levels, states parties will have to allocate sufficient sums to education. Although there is a great deal of disagreement about the optimal level of public expenditure for education, proposals tend to converge at about 5 to 7 per cent of the gross national product.[108] Nevertheless, many states make notably less available. This also conflicts with the criterion of the "accessibility" of education.

Decisions on the mobilisation and allocation of funds, required for the performance of public functions, are political in nature. For this reason, it is widely accepted that such decisions should not be taken by courts. As has been stated above, however,[109] although state discretion in this respect should be largely unfettered, domestic courts should be competent to adjudicate on whether decisions related to taxation and the allocation of funds respect basic human rights, including the right to education.[110] The right

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[104] See Tomaševski, 2001c, pp. 20–22.

[105] For states to be able to meet their obligations with regard to ESCR, the tax to GDP ratio should optimally lie above 30 per cent. The average tax to GDP ratio in OECD countries lies between 30 and 40 per cent.

[106] Tomaševski, 2001c, p. 22.

[107] Bentaouet Kattan, R. and N. Burnett, *User Fees in Primary Education*, Washington, D.C.: The World Bank, 2004, p. 13. Concerning the 20 per cent-total in East Asia, see Bray, M., *Counting the Full Cost: Parental and Community Financing of Education in East Asia*, Washington, D.C.: The World Bank, 1996, p. 32.

[108] See Tomaševski, 1999a, para. 34 (UN Doc. E/CN.4/1999/49).

[109] See 10.4.1.1.1. *supra*.

[110] In this regard, reference may be made to a case decided by the Supreme Court of the Philippines, in which the court was prepared to review budgetary allocations for education. In the case of *Guingona, Jr. v. Carague*, G.R. No. 94571, 22 April 1991, a group of senators had challenged the constitutionality of budgetary allocations for debt-servicing, which had exceeded those for education three times. The Constitution of the Philippines obliged the state to assign the highest budgetary priority to education. The Court decided

to education demands, for example, that allocations within education prioritise primary education. Even so, in many countries most money goes to higher education, whose students are the most expensive to school, the fewest in number and the most likely to belong to the country's elite.[111] The reason for this is that whereas university students are politically vocal, primary school children are not, which often means that the latter are neglected in the allocation of resources. This is a typical case where the right to education should function as a corrective to democratic processes. Courts should be in a position to query any such preference in the allocation of funds for higher education.[112]

4.1.3. *Acceptability*

Education must be made acceptable at all levels of education. The CESCR has remarked as follows on the criterion of the "acceptability" of education:

> [T]he form and substance of education, including curricula and teaching methods, have to be acceptable (*e.g.* relevant, culturally appropriate and of good quality) to students and, in appropriate cases, parents; this is subject to the educational objectives required by article 13(1) and such minimum educational standards as may be approved by the State.[113]

It is generally accepted that the state must play a regulatory role in education.[114] It must set and enforce minimum standards to ensure that education is acceptable to all.[115] Standards must be formulated to safeguard the safety and health of students in schools, to ensure that education is of good quality, that it satisfies essential learning needs and that it respects the cultural background of students. The notion of "acceptability" also entails that the right of parents to ensure their children's religious and moral education in conformity with their own convictions must be respected. As this idea has explicitly been incorporated in article 13(3) ICESCR, it

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that education had, in fact, been assigned the highest budgetary priority, while debt-servicing was necessary to safeguard the creditworthiness of the country and the survival of its economy.

[111] In the extreme, budgetary allocations for higher education exceed up to 1 000 times those for primary education. See Tomaševski, 1999a, para. 37 (UN Doc. E/CN.4/1999/49).

[112] See Tomaševski, 1999a, para. 37 (UN Doc. E/CN.4/1999/49) and Tomaševski, 2001f, pp. 42–44.

[113] General Comment No. 13, see note 2, para. 6.

[114] In the *Belgian Linguistic Case*, the European Court of Human Rights stated that "[t]he right to education . . . by its very nature calls for regulation by the State, regulation which may vary in time and place according to the needs and resources of the community and of individuals". See *Case "relating to certain aspects of the laws on the use of languages in education in Belgium" (Merits)*, Judgement of 23 July 1968, Publications of the European Court of Human Rights, Series A, Vol. 6, p. 32, para. 5.

[115] See Tomaševski, 1999a, para. 62 (UN Doc. E/CN.4/1999/49).

will be addressed below in the discussion of the said provision.[116] "Acceptability" further entails that the opportunities for instruction in the mother tongue must be maximised. This aspect has been dealt with above when discussing the cautious steps at the international level towards the recognition of a right to be educated in the language of one's choice[117] and in the various sections of this book dealing with the educational rights of members of minorities and indigenous peoples.[118]

4.1.3.1. *Methods of instruction, the contents of textbooks, and teachers' conduct*
It is often accepted that education is inherently good. Discussions about education thus focus on how to increase its provision and on how to improve access thereto, and neglect the question as to the acceptability of the contents of education. Getting children to school, however, does not solve all problems. Attention must also be given to the contents of education to ensure that these respect basic human rights values. A failure to do so may have serious consequences. The Special Rapporteur of the Commission on Human Rights on Rwanda at the time has shown how education contributed to the genocide in Rwanda, by creating and reinforcing mutual Hutu-Tutsi prejudices. Successive governments moulded education to condition the population to the acceptance of ethnic discrimination. The Special Rapporteur commented:

> The schools took it upon themselves to develop actual theories of ethnic differences, based on a number of allegedly scientific data which were essentially morphological and historiographical. In the first case, the two main groups can be differentiated by appearance, as the Tutsi are "long" whereas the Hutu are "short"; the Tutsi are handsome, genuine "black-skinned Europeans" while the Hutu are "ugly", genuine "Negroes". The fact that the Hutu occupied the country before the Tutsi makes them indigenous, whereas the Tutsi, as descendants of Europeans, are invaders. These purportedly scientific data inevitably created a psychosis of fear and mistrust which gradually became a veritable culture of mutual fear and led to another theory, that of pre-emptive self-defence based on the "kill or be killed principle". This theory was a major factor in the 1994 genocide.[119]

This example clearly demonstrates that education is not inherently good.[120] The criterion of the "acceptability" of education signifies that steps must be taken to ensure that the contents of education honour basic human

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[116] See 10.5.1. *infra*.
[117] See 9.3.3.2. *supra*.
[118] See 4.11., 4.12., 5.2.1.4., 5.2.1.5., 5.3.4., 6.2.2.1.2.6., 6.3.2.3. and 9.3.3.3. *supra*.
[119] Degni-Ségui, R., *Report on the Situation of Human Rights in Rwanda*, UN Doc. E/CN.4/1997/61, para. 25 (submitted by the Special Rapporteur of the Commission on Human Rights on Rwanda).
[120] See Tomaševski, 2001f, pp. 26–32.

rights values. This means *inter alia* that *the methods of instruction must respect the child's dignity*, that *the contents of textbooks must be accurate, neutral and fair*, and that *teachers' conduct must promote tolerance*.

International rankings on educational performance regularly show East Asia and Eastern Europe to outperform the West. These rankings are, however, deceptive in many ways. They do not reveal whether the education systems of the states concerned and *the methods of instruction* applied are consonant with the child's dignity.[121] Many of the states placed at the top of performance tables fail from a human rights perspective. Often the said states stress rote learning rather than the development of analytical skills. Learners are expected to memorise and repeat masses of information without being given the opportunity to ask questions. The pressure on students to perform well is high and the general environment in schools extremely competitive. Teaching often involves elements of compulsion, such as corporal punishment, to force pupils to do well.[122] These methods of instruction clearly do not honour the dignity of the child. For education to be acceptable, the methods of instruction must at all times respect the child's dignity.

States parties are further obliged to ensure that *the contents of textbooks* are accurate, neutral and fair.[123] The question is how they should do so. On the face of it, the screening of textbooks by governments seems to be a solution. Textbook screening by governments, however, always entails a risk of abuse of power. This method should, therefore, not be applied. A better solution would be to have textbooks reviewed by commissions of independent experts. The experts should, if possible, come from different countries, notably those mentioned in the textbooks. In addition, states parties should ensure that students are taught how to protect themselves against all forms of bias, prejudice and intolerance in textbooks. It has thus been proposed that students be exposed to historical examples of abuses of history in textbooks to enable them to recognise manipulation and to protect themselves against it.[124] Unfortunately, however, state practice largely follows the censorship route. Reference may be made to the *Ienaga* case in Japan in this context. In 1965, the historian Saburo Ienaga

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[121] See Tomaševski, 2001d, pp. 22–23.

[122] The Special Rapporteur on the Right to Education mentions the example of Singapore, whose students performed best in the Third International Mathematics and Science Study in 1997. Students in Singapore are often caned if they do not obtain good marks in exams. As a result, they sometimes get so anxious over exams that they suffer from asthma, cold sweats and diarrhoea. See *ibidem* at pp. 22–23.

[123] See *ibidem* at pp. 17–22.

[124] See Wirth, L., "Facing misuses of history", in: *The Misuses of History: Learning and Teaching about the History of Europe in the 20th Century, Oslo (Norway), 28–30 June 1999*, Strasbourg: Council of Europe Publishing, 2000, pp. 52–53.

brought a court case against the Japanese government, which through textbook screening had been controlling the content of history taught in secondary schools. Also some of Ienaga's textbooks had been censored. Through textbook screening the government had repeatedly removed or softened truthful descriptions of atrocities committed by the Japanese military during World War II. Ienaga's case was based on the argument that textbook screening violated freedom of expression and freedom of education. He lost the case, however. The Supreme Court held in 1993 that the contents of textbooks had to be accurate, neutral and fair, and that the screening of textbooks was a proper method to ascertain this, holding that "students do not have enough capability to criticise the content of class education and they can hardly choose a school or a teacher".[125]

For education to be acceptable, *teachers' conduct* must promote human rights.[126] In particular, teachers must not abuse teaching to propagate hatred against certain racial, ethnic or religious groups. Instead, their conduct should further tolerance towards others. This covers the conduct of teachers both on and off duty. In the Canadian case of *Ross v. New Brunswick School District No. 15*,[127] the Supreme Court aptly commented on the role of teachers. It stated that schools must promote the values of tolerance and impartiality and that, as teachers were the "medium" through which this was to take place, teachers had to be perceived to uphold the values sought to be transmitted by the school system. The conduct of teachers, according to the Court, is evaluated on the basis of their position, rather than whether the conduct occurs within the classroom or beyond.[128] The Court stated:

> Teachers are inextricably linked to the integrity of the school system. Teachers occupy positions of trust and confidence, and exert considerable influence over their students as a result of their positions. The conduct of a teacher bears directly upon the community's perception of the ability of the teacher to fulfil such a position of trust and influence, and upon the community's confidence in the public school system as a whole.[129]

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[125] *Ienaga v. Japan*, Supreme Court of Japan, (O) No. 1428 of 1986, Judgement of 16 March 1993. In 1984, Ienaga brought another court case against the Japanese government, concerning nine screening comments the government had made on his draft textbooks from 1980 to 1983. The High Court ruled that three of these were illegal. The Supreme Court further ruled in 1997 that the Education Ministry had acted illegally when it had removed a description of Japan's biological experiments on 3 000 people in northern China, but rejected the other claims, including that concerning a passage deleted which described the rape of Chinese women by Japanese soldiers. The Supreme Court had not altered its views on textbook screening but only found that there existed reliable evidence to substantiate the description deleted. See *Ienaga v. Japan*, Supreme Court of Japan, (O) No. 1119 of 1994, Judgement of 29 August 1997.

[126] See Tomaševski, 2001d, p. 14.

[127] (1996) 1 S.C.R. 825.

[128] *Ibidem* at paras. 42–45.

[129] *Ibidem* at para. 43.

In the present case, a teacher had published anti-Jewish pamphlets in his capacity as a private citizen. A Board of Inquiry subsequently ordered that the teacher be given a non-teaching position, and further that he should be dismissed from this position if he continued to publish anti-Semitic tracts. The Supreme Court upheld the first, but reversed the second part of the board's order. In the Court's view, the first part of the board's order, to the effect that the teacher could not continue in a teaching position, restricted freedom of expression, but was a reasonable limit, as it furthered a pressing and substantial objective, namely, the right of children to be educated in a school system that is free from bias, prejudice and intolerance.[130] The second part of the order was also held to restrict freedom of expression, but it was held to fail the minimal impairment test and thus not to be justifiable.[131] The Supreme Court, therefore, placed greater limitations on the freedom of speech of teachers than of others, since the teacher *in casu* was barred from publishing his discriminatory materials as a teacher, but not as a non-teacher.[132]

4.1.3.2. *School discipline: The practice of defining pregnancy as a disciplinary offence and corporal punishment as a disciplinary measure*

Another facet of the acceptability of education is that all aspects of school discipline must be consonant with the individual's dignity and his human rights. Reference has been made above to article 28(2) CRC, which obliges states parties to "take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the [CRC]".[133] Unlike the CRC, the ICESCR contains no provision on school discipline. This notwithstanding, the CESCR comments on this issue in paragraph 41 General Comment No. 13,[134] holding that all aspects of school discipline must be consistent with human dignity and respect Covenant rights. The Committee stresses that states parties are obliged to take measures to ensure that discipline not consistent with these requirements does not occur in any public or private educational

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[130] *Ibidem* at paras. 80–83 and paras. 96–97.

[131] *Ibidem* at paras. 102–107.

[132] The teacher in this case subsequently brought the matter before the Human Rights Committee, claiming that his removal from the teaching position violated, amongst others, his right to freedom of expression in art. 19 ICCPR. See *Malcolm Ross v. Canada*, HRC, Communication No. 736/1997, 26/10/2000, UN Doc. CCPR/C/70/D/736/1997. The Committee upheld the Canadian Supreme Court's decision, however. At 11.6, it stated that "the removal of the author from a teaching position can be considered a restriction necessary to protect the right and freedom of Jewish children to have a school system free from bias, prejudice and intolerance".

[133] See 4.5.2. *supra*.

[134] See note 2.

institution. It further "welcomes initiatives taken by some States parties, which actively encourage schools to introduce 'positive', non-violent approaches to school discipline". In what follows, two aspects of school discipline will be addressed, both of which conflict with the criterion of the "acceptability" of education, namely, *the practice of defining pregnancy as a disciplinary offence* and *corporal punishment as a disciplinary measure*.

In some countries, schools define *pregnancy as a disciplinary offence*, which usually leads to the expulsion of the pregnant girl from school, this sometimes precluding the girl from continuing education. In other countries, girls who get pregnant are penalised by being suspended from normal schooling and being re-routed into special classes. These actions are usually justified on the basis that it is necessary to uphold a moral norm which prohibits teenage sex. Even so, the practice of defining pregnancy as a disciplinary offence violates the right to education.[135] This is quite clear in those cases where the girl is expelled from school. Expulsion leaves the girl without access to education for a long time or, in fact, permanently, for example, where she subsequently is above the age criteria for the class she should be continuing in. But, also the cases of suspension and re-routing violate the right to education. In this context, reference may be made to the case of *Martinez Martinez y Suarez Robayo v. Collegio Cuidad de Cali* decided by the Supreme Court of Colombia in 1998.[136] The case concerned school regulations which envisaged penalisation of pregnancy by suspension and re-routing into tutorials. The Court considered that although suspension did not imply a definitive loss of the right to education, it implied the provision of education to pregnant girls in conditions which were stigmatising and discriminatory. In the opinion of the Court, such stigmatisation and discrimination constituted punishment. The Court went on to state:

> The conversion of pregnancy—through school regulations—into a ground for punishment violates fundamental rights to equality, privacy, free development of personality, and to education.[137]

The Court, accordingly, ordered that the regulations be altered and the pregnant girls to whom they were applied be allowed to return to normal schooling. In sum, therefore, states parties must change the practice of

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[135] See Tomaševski, 2000a, paras. 56–60 (UN Doc. E/CN.4/2000/6).

[136] *Crisanto Arcangel Martinez Martinez y Maria Eglina Suarez Robayo v. Collegio Cuidad de Cali*, Supreme Court of Colombia, No. T-177814, 11 November 1998.

[137] Translation from original Spanish text, ". . . [e]xigir—por vía reglamentaria—el embarazo de una estudiante en causal de sanción, viola los derechos fundamentales a la igualdad, a la intimidad, al libre desarollo de la personalidad y a la educación". See Tomaševski, 2000a, para. 60 (UN Doc. E/CN.4/2000/6).

defining pregnancy as a disciplinary offence. In the African context, article 11(6) of the African Charter on the Rights and Welfare of the Child provides a good starting point for this. It obliges states parties to take all appropriate measures to ensure that girls who become pregnant before completing their education have an opportunity to continue with their education on the basis of their individual ability.[138]

Corporal punishment as a disciplinary measure in schools has been the topic of a heated debate in the past twenty years or so. The matter has been extensively litigated before the former European Commission of Human Rights and the European Court of Human Rights.[139] The question is whether the case law so produced may serve as a guideline for the interpretation of article 13 ICESCR, which is silent on the issue. As the said case law is not always easy to comprehend, the essential aspects thereof will be outlined in a table. The provisions of the European Convention on Human Rights which are relevant in this regard are the first sentence of article 2 First Protocol ECHR, stating that no person must be denied the right to education, the second sentence of article 2 First Protocol ECHR, obliging the state, in the exercise of the functions which it assumes in relation to education, to respect the right of parents to ensure such education in conformity with their own religious and philosophical convictions, article 3 ECHR, providing that no one must be subjected to torture or to inhuman or degrading treatment or punishment, and article 8 ECHR, protecting the right of everyone to respect for his private life.

Case	Facts	Decision
Corporal punishment in public schools:		
Campbell and Cosans v. UK (Court)[140]	Mrs. Campbell's son Gordon attended the primary school in Scotland. The school authorities refused Mrs. Campbell's requests	The Court held that Mrs. Campbell's and Mrs. Cosans's views on the use of corporal punishment constituted philosophical convictions, and that, accordingly, the refusal to accept their rejection

[138] On the African Charter on the Rights and Welfare of the Child, see 5.4.4. *supra*. The ComRC, in General Comment No. 4 (Thirty-Third Session, 2003) Adolescent health and development in the context of the Convention on the Rights of the Child [*Compilation*, 2004, pp. 321–332], para. 31, similarly urges states parties "to develop policies that will allow adolescent mothers to continue their education".

[139] For an overview of the case law of Commission and Court, see Van Bueren, 1995, pp. 249–253 and Nowak, 1995b, pp. 208–209.

[140] *Campbell and Cosans v. United Kingdom*, Judgement of 25 February 1982, Publications of the European Court of Human Rights, Series A, Vol. 48. For a short note on this case, see Wildhaber, 1986/2000, pp. 38–41, paras. 136–147. See also Ghandhi, 1984, pp. 488–494.

	for a guarantee that Gordon would never receive corporal punishment. In fact, Gordon was never so punished and left the school at age 10. Mrs. Cosans's son Jeffrey had tried to take a prohibited shortcut on his way home from school and was told, at age 15, to report to receive corporal punishment. Both he and his parents refused, however, to accept the punishment. Jeffrey was suspended from school, until he would accept the punishment. He remained excluded from school for more than a year until he ceased to be of compulsory school age. In both cases, corporal punishment would have entailed the use of a leather strap to strike the palm of the hand.	of corporal punishment amounted to a violation of their right to ensure education in conformity with their philosophical convictions (2nd sentence art. 2 P-1 ECHR).[141] The Court held that Jeffrey Cosans had been denied the right to education (1st sentence art. 2 P-1 ECHR). It stated that although this right called for regulation, such regulation must never injure the substance of the right nor conflict with other rights protected in the ECHR. The Court considered that acceptance of corporal punishment as a condition of access to education conflicted with another right, namely, the right in the 2nd sentence art. 2 P-1 ECHR, and, therefore, constituted regulation which could not be described as reasonable.[142] With regard to art. 3 ECHR, the Court found that neither pupil in this case had been strapped. It stated that a mere threat of conduct forbidden by art. 3 could violate art. 3, if it was sufficiently real and immediate, but considered that there was no evidence that the risk in this case had attained the minimum level of severity.[143]
Warwick v. UK (Commission)[144]	Karen Warwick, aged 16, had been given a caning of a single stroke on the hand by a headmaster in the presence of his deputy for having smoked on her way home from	The Commission decided that there had been a violation of the 2nd sentence art. 2 P-1 ECHR and also of art. 3 ECHR. With regard to art. 3, the Commission held that the caning had caused Karen humiliation and had attained a sufficient degree of seriousness to be regarded as degrading.[145]

[141] See also the discussion of this aspect of the case at 10.5.1.3.4.2. *infra.*

[142] *Campbell and Cosans v. United Kingdom*, see note 140, para. 41.

[143] *Ibidem* at paras. 25–31.

[144] Commission, Application No. 9471/81, *Warwick v. United Kingdom*, Report of 18 July 1986, DR 36, p. 49.

[145] The case was not referred to the Court, but instead was resolved by the Committee of Ministers. As a result of diplomatic negotiation, the Committee did not attain the two-thirds majority necessary to decide that art. 3 ECHR had been violated. The Committee upheld the finding of a violation of the 2nd sentence art. 2 P-1 ECHR. See Resolution DH [89] 5, 2 March 1989, DR 60, p. 22.

	school. The caning had broken blood vessels in the girl's hand. The school had also refused to give to Mrs. Warwick, Karen's mother, an assurance that Karen would not be subject to corporal punishment at school.	
Corporal punishment in private schools:		
Y v. UK (Commission)[146]	A 15-year-old boy had been given four powerful hits on his buttocks with a cane by the headmaster of a private school for vandalism.	The Commission held that the state's supervisory function in the field of education also covered private schools and thus that it had a duty to assure that also pupils at private schools were not exposed to treatment contrary to art. 3 ECHR. The Commission viewed the corporal punishment as sufficiently severe to amount to a violation of art. 3.[147]
Costello-Roberts v. UK (Court)[148]	Jeremy Costello-Roberts, aged 7, had received corporal punishment, consisting of three whacks with a rubber-soled gym shoe on his clothed bottom, by the headmaster of a private school. Under	The Court decided that states parties were responsible to secure respect for the ECHR's rights by private schools. The state could not evade its duties by delegating these to private persons or organs. The disciplinary systems of both public and private schools thus had to comply with the guarantees of the Convention.[149]

[146] Commission, Application No. 14229/88, *Y v. United Kingdom*, Report of 8 October 1991, *Human Rights Law Journal*, Vol. 12, 1991, p. 61.

[147] The case went to the Court, but there the parties agreed to a friendly settlement, involving the payment of a sum of money as satisfaction. See *Y v. United Kingdom*, Judgement of 29 October 1992, Publications of the European Court of Human Rights, Series A, Vol. 247–A.

[148] *Costello-Roberts v. United Kingdom*, Judgement of 25 March 1993, Publications of the European Court of Human Rights, Series A, Vol. 247–C. For a short note on this case, see Wildhaber, 1986/2000, pp. 42–45, paras. 148–156. See also Freeman, 1994, pp. 81–82.

[149] *Costello-Roberts v. United Kingdom*, see note 148, paras. 25–28. It should further be noted that there does not follow from the rights to freedom of religion (art. 9 ECHR) and respect for one's family life (art. 8 ECHR) a right of parents to claim that they are entitled to send their children to a private school which applies corporal punishment as a disciplinary measure. In September 2000, the European Court of Human Rights unanimously and without a hearing rejected the application of individuals associated with a group of Christian private schools in the United Kingdom, who had alleged that the implementation of a ban on corporal punishment in private schools infringed parents' rights to freedom of religion and family life. See *Williamson and Others v. United Kingdom*, European Court of Human Rights, Application No. 55211/00, Admissibility Decision, 2000.

the school's disciplinary system, he had accumulated the requisite demerit marks for the punishment. The final mark was awarded for talking in the corridor. The beating was administered three days after the boy had been informed that he would be beaten.	The Court decided that art. 3 ECHR had not been violated, as the beating had not attained the minimum level of severity to be regarded as degrading. It ruled that corporal punishment might constitute an assault on a person's dignity, but, in order for it to be "degrading", the humiliation had to attain a particular level of severity, other than the usual element of humiliation inherent in any punishment. The assessment of the minimum level depended upon all the circumstances of the case, such as the nature and context of the punishment, the manner and method of its execution, its duration, its physical and mental effects and, in some cases, the sex, age and state of health of the child.[150] The Court also decided that the corporal punishment had not attained the required level of severity to amount to unjustified interference with the boy's bodily or moral integrity in violation of art. 8 ECHR, which protects the right to privacy.[151] The applicants did not rely on art. 2 P-1 ECHR in this case.

The above case law may guide the interpretation of article 13(3) ICESCR in as far as it holds that views on the use of corporal punishment as a disciplinary measure in schools constitute philosophical convictions and that the refusal to accept the rejection by parents of corporal punishment amounts to a violation of their right to ensure their children's education in conformity with their philosophical convictions. For the rest, however, the case law is highly problematic. The general purport thereof is that for corporal punishment to be degrading, it must not be moderate, but the humiliation involved must attain a level of severity other than the usual element of humiliation inherent in any punishment. With due respect, this view is not acceptable. It is submitted that corporal punishment *per se*

[150] *Costello-Roberts v. United Kingdom*, see note 148, paras. 30–32. A minority of judges considered the punishment to have been degrading, thus violating art. 3 ECHR. They viewed it as degrading because of its ritualised nature. The judges would have been prepared to sanction "a spanking on the spur of the moment". Its official and formalised nature, however, they argued, made the punishment degrading. See judgement at p. 64.

[151] *Costello-Roberts v. United Kingdom*, see note 148, paras. 33–36.

amounts to degrading treatment, whether meted out in public or private schools.[152] It involves the deliberate infliction of pain, is of an institutionalised nature, is impersonal, because it is executed in alien surroundings by a stranger, and is inherently arbitrary and capable of abuse. Corporal punishment treats the child as an object and not as a human being, and thus infringes his dignity.[153] In his dissenting opinion in the European Commission of Human Rights' decision in the *Campbell and Cosans* case, Mr. Klecker aptly remarked:

> Corporal punishment amounts to a total lack of respect for the human being; it therefore cannot depend on the age of the human being. . . . The sum total of adverse effects, whether actual or potential, produced by corporal punishment on the mental and moral development of a child is enough, as I see it, to describe it as degrading within the meaning of Article 3 of the Convention.[154]

Accordingly, the decision in the *Costello-Roberts* case should not be followed at the international level. It has been said of that decision that it "is as regressive as it is regrettable" and that "[i]t may be safely predicted to be the last defence of the beating of children by an international court".[155]

The case law of Commission and Court also does not bear out that the use of corporal punishment as a disciplinary measure in public and private schools violates the right to education. This is perhaps due to the negative formulation of that right in the first sentence of article 2 P-1 ECHR. Corporal punishment is not compatible with the "acceptability" criterion

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[152] The European Committee of Social Rights, supervising the ESC/Revised ESC, has recently held that, in terms of art. 17 ESC/Revised ESC on the right of children to protection, states parties must prohibit any form of corporal punishment of children, to avoid "discussions and concerns as to where the borderline would be between what might be acceptable corporal punishment and what is not". The Committee has also stated that it "does not consider that there can be any educational value in corporal punishment of children that cannot be otherwise achieved". See European Committee of Social Rights, General Observation on corporal punishment, Conclusions XV-2, Vol. 1, 2001.

[153] The Supreme Court of Namibia, in the case of *Ex parte Attorney-General, Namibia: In re Corporal Punishment by Organs of State* 1991 (3) SA 76 (NmSC), stated at p. 93H-I that corporal punishment is "an invasion on the dignity of the students sought to be punished. It is . . . clearly open to abuse. It is often retributive. It is . . . alienating. It is also . . . degrading to the student sought to be punished . . .".

[154] (1980) 3 E.H.R.R. 531 at p. 556.

[155] Freeman, 1994, p. 82. In a different context, that of parental rights to reasonable chastisement, however, the European Court of Human Rights has recently upheld its approach of requiring a minimum level of severity for corporal punishment to be regarded as degrading in violation of art. 3 ECHR. In the case of *A v. United Kingdom*, Judgement of 23 September 1998, European Court of Human Rights, Reports of Judgements and Decisions 1998–VI, the Court decided that states parties could be liable in terms of the ECHR for failing to take measures to protect children against serious breaches of their personal integrity, including those committed by private persons. *In casu*, the UK was held liable for not having afforded protection to a 9-year-old boy who had repeatedly been beaten by his step-father with a garden cane, leaving bruises on his thighs and buttocks for a week.

of the right to education. It violates the core value underlying the right to education, and human rights generally, namely, individual dignity. This has now also been acknowledged by the CESCR. Paragraph 41 General Comment No. 13[156] thus states:

> In the Committee's view, corporal punishment is inconsistent with the fundamental guiding principle of international human rights law enshrined in the Preambles to the Universal Declaration of Human Rights and both Covenants: the dignity of the individual.[157]

In conclusion, therefore, corporal punishment as a disciplinary measure in public and private schools violates the right not to be subjected to degrading treatment and the right to education.[158]

4.1.3.3. *The learner as the bearer of rights*

The right to education is often understood to mean the right of the child "to be sent to school" and "to be fed with information"—the state, teachers and parents deciding upon what is to be taught and how. The child is seen as the passive recipient of knowledge. This is the false approach, however. The right to education, in particular the "acceptability" criterion of education, demands that the learner be recognised as the bearer of rights in the educational process.[159] These rights constrain, as it were, the competence of parents, teachers and the state to regulate education for children. Without attempting to provide an exhaustive inventory of rights children hold in education, the following list mentions some of the entitlements which should be recognised to accrue to children in education:

- The learner should be held to have a right to sex education.[160]
- He should be held to have a right to receive information on HIV/AIDS. In its General Comment No. 3 on HIV/AIDS and the rights of the child, the Committee on the Rights of the Child thus stresses:

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[156] See note 2.

[157] This view is shared by the ComRC. See its General Comment No. 1, see note 18, para. 8.

[158] An abundance of national and international legal materials (texts of legal instruments, judgements of national courts and observations of regional and international human rights bodies) on the topic of corporal punishment is available on the website of the Global Initiative to End All Corporal Punishment of Children at www.endcorporalpunishment.org.

[159] See Tomaševski, 2001f, pp. 44–47.

[160] Art. 24(2)(f) CRC obliges states parties "to develop preventive health care, guidance for parents and family planning education and services". The ComRC, in General Comment No. 3 (Thirty-Second Session, 2003) HIV/AIDS and the rights of the child [*Compilation*, 2004, pp. 308–321], para. 6, interprets art. 24(2)(f) to include the right to sex education for children. Similarly, the CEDAW guarantees the right to sex education to girls and women. See arts. 10(h) and 16(1)(e) CEDAW, and the Committee on the Elimination of Discrimination against Women's General Recommendation No. 21 (Thirteenth Session,

> States parties are reminded that children require relevant, appropriate and timely information [on HIV/AIDS] which recognises the differences in levels of understanding among them, is tailored appropriately to age level and capacity and enables them to deal positively and responsibly with their sexuality in order to protect themselves from HIV infection. The Committee wishes to emphasise that effective HIV/AIDS prevention requires States to refrain from censoring, withholding or intentionally misrepresenting health-related information, including sexual education and information, and that, consistent with their obligations to ensure the right to life, survival and development of the child (art. 6), States parties must ensure that children have the ability to acquire the knowledge and skills to protect themselves and others as they begin to express their sexuality.[161]

- The learner should be held to have a right to be provided with information on the dangers of tobacco, alcohol, drugs and other dependence-producing substances.[162]
- He should generally be held to have a right to health education.[163]
- There should be an "[i]nvolvement of young persons as active and effective participants in, rather than mere objects of, the educational process".[164]
- Children should be recognised to have a right to schools which are child-friendly, *i.e.* which respect their right "to be curious, to ask questions and receive answers, to argue and disagree, to test and make mistakes, to know and not know, to create and be spontaneous, to be recognised and respected".[165]

1994) Equality in marriage and family relations [*Compilation*, 2004, pp. 253–262], para. 22. On access to sex education, see Tomaševski, 2004a, paras. 35–42 (UN Doc. E/CN.4/2004/45).

[161] ComRC, General Comment No. 3 (Thirty-Second Session, 2003) HIV/AIDS and the rights of the child [*Compilation*, 2004, pp. 308–321], para. 16. Para. 18 refers to the critical role of education in providing children with information on HIV/AIDS, which increases awareness of the pandemic, prevents negative attitudes towards victims of HIV/AIDS, and empowers children to protect themselves from the risk of HIV infection. States parties are reminded of their duty to ensure that primary education is available to all children, whether infected, orphaned or otherwise affected by HIV/AIDS, and that they must ensure that children affected by HIV/AIDS can stay in school and that teachers lost to AIDS are replaced by other qualified teachers.

[162] Para. 25 of the Guidelines for the Prevention of Juvenile Delinquency ("The Riyadh Guidelines"), adopted by UNGA Resolution 45/112 of 14 December 1990, thus states in part, "Information on the use and abuse of drugs, including alcohol, should be made available to the student body".

[163] Art. 24(2)(e) CRC protects the child's right to have access to education of child health. See also paras. 16, 17, 36 and 44(d) of the CESCR's General Comment No. 14 (Twenty-Second Session, 2000) [UN Doc. E/2001/22] The right to the highest attainable standard of health (art. 12 ICESCR) [*Compilation*, 2004, pp. 86–106], recognising the right to health education. Para. 44(d) holds that "[t]o provide education and access to information concerning the main health problems in the community, including methods of preventing and controlling them" is a core obligation arising from art. 12.

[164] The Riyadh Guidelines, see note 162, para. 21(c).

[165] Hammarberg, T., "A school for children with rights", *Innocenti Lectures*, UNICEF International Child Development Centre, Florence, 23 October 1997, p. 19.

- Children have a right not to be exposed to violence in schools. This covers violence exerted by teachers in the name of school discipline. The Riyadh Guidelines thus require national education systems to avoid harsh disciplinary measures, particularly corporal punishment.[166] But, it also covers bullying, harassment and violence suffered by students at the hand of other students.[167]
- Article 12(1) CRC obliges states parties to "assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child". Applied to the education context, this means, amongst others, that ". . . students should be represented in bodies formulating school policy, including policy on discipline, and decision-making".[168]
- Article 13 CRC grants to the child the right to freedom of expression. In 1969, the US Supreme Court in the case of *Tinker v. Des Moines Independent Community School District*[169] upheld a child's right to freedom of speech in school, exercised in this case by the wearing of a black armband as a protest against the Vietnam war. The Court made the following apt comment:

> In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views. . . . The principle . . . is not confined to the supervised and ordained discussion which takes place in the classroom. . . . When [the student] is in the cafeteria, or on the playing field, or on the campus during the authorised hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without materially and substantially interfering with the requirements of appropriate discipline in the operation of the school and without colliding with the rights of others.[170]

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[166] The Riyadh Guidelines, see note 162, para. 21(h).

[167] The right of children not to be exposed to violence in schools has been dealt with by the ComRC at its General Discussion Day on violence against children within the family and in schools, held on 28 September 2001 at its twenty-eighth session. See UN Doc. CRC/C/111, paras. 674–745.

[168] The Riyadh Guidelines, see note 162, para. 31.

[169] 393 U.S. 503 (1969).

[170] *Ibidem* at paras. 511–513.

- The child should be held to have a right to express his personality in school. In 1998, the Supreme Court of Colombia examined a case concerning a boy who had been wearing an ear-ring in class. The teacher had commented that this suggested that he was a homosexual. The Court faulted the teacher's behaviour. It argued that relations between pupils and teachers should be altered:

> The subjects of the educational process are not divided into passive recipients of knowledge and active depositories of wisdom. The constitutional principle which guarantees the free development of personality and the right to participate in the educational community have transformed the learners into active subjects who participate in education through their rights and duties . . . The relation pupil-teacher is not based upon the authority which the teacher can exercise as the ultimate depository of wisdom or through his hierarchically superior position, but rather upon reciprocal respect of the subjects of the educational process with the same possibility for free expression, under the sole condition of not jeopardising the rights of others or the just order.[171]

4.1.4. *Adaptability*

Education must, finally, be made adaptable at all levels of education. The Committee has commented as follows on the criterion of the "adaptability" of education:

> [E]ducation has to be flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings.[172]

States parties to the ICESCR must ensure that education is adaptable so that it can respond to the needs of a constantly changing society. The opposing pressures of globalisation and localisation increasingly influence the definition of the said needs. Since the beginning of the 1990s, one may observe, on the one hand, international flows of trade, capital and information, but, on the other also, processes of decentralisation and the strengthening of local and regional structures. Education must be able to respond to rapidly changing global realities, but simultaneously accommodate the needs of local ethnic, religious or linguistic identities.[173] It has been stated that "[a] balance between the exposure of children to the local and global community is complemented by their need to familiarise them-

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[171] Supreme Court of Colombia, No. T-259, 27 May 1998, cited by Tomaševski, 2001f, p. 46.

[172] General Comment No. 13, see note 2, para. 6.

[173] See Tomaševski, 1999a, para. 71 (UN Doc. E/CN.4/1999/49).

selves with their own as well as foreign cultures".[174] This may be accomplished by designing education in such a way that, rather than merely observing the previously prohibitory approach of international human rights law, it uses a constructive one. In the past, efforts have been directed at the prohibition of incitement to discrimination through prejudicial portrayal of refugees, migrant workers, minorities or indigenous peoples. These days, curricula and textbooks should be revised to ensure that they convey positive images of foreign cultures.[175]

Education must be flexible so that it can adapt to the needs of many different groups of persons. It needs to be diversified so that it can fulfil the educational needs of minority and indigenous communities, refugees, migrant workers, detained persons, and many other groups.[176] A need for the adaptability of education has further been recognised with regard to the special situation of disabled and working children.

4.1.4.1. *Disabled children*

Amongst the most far-reaching judicial interpretations of the right to education are those of national courts dealing with *disabled children*.[177] These interpretations underline the principle increasingly emphasised by international law in terms of which the schooling of disabled children should be guided by the objective of inclusiveness.[178] The conviction is that disabled children should, as far as possible, be educated in integrated settings in mainstream educational institutions. This imposes upon schools, teachers and students a duty to adapt to learners with divergent needs and abilities. Courts in many countries have affirmed this duty and thus given meaning to the notion that "education has to be adapted to each child rather than forcing children to adapt to whatever schooling has been designed for them".[179] It must suffice here to refer to the decision of one such court, the German Federal Constitutional Court.[180]

The facts of the case concerned were as follows: The applicant had been born with a defective spinal cord. As a result, her legs were paralysed. She could also not properly co-ordinate bodily movements. She could speak

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[174] *Ibidem* at para. 72.

[175] See *idem*.

[176] On the educational needs of the various groups of persons and how they are provided for by diverse international legal instruments, see Chapter 4 *supra*.

[177] On the criterion of the "adaptability" of education and the special situation of disabled children, see Tomaševski, 2001e, pp. 31–33.

[178] See, notably, Rule 6 of the Standard Rules on the Equalisation of Opportunities for Persons with Disabilities, discussed at 4.8.3. *supra*.

[179] Tomaševski, 2001e, p. 31.

[180] *Integrated Schooling Case*, German Federal Constitutional Court, Judgement of 8 October 1997, *Entscheidungen des Bundesverfassungsgerichts*, Vol. 96, pp. 288–315.

and move only very slowly. The first four years of her schooling had taken place at an ordinary elementary school. Subsequently, she changed schools, starting her fifth year at a comprehensive school. An expert opinion concluded that she would need extensive special pedagogical support to be able to remain at the school concerned. A support commission similarly found that she would require certain separate tuition and the help of a pedagogical assistant. The educational authorities thereupon determined that the applicant needed special pedagogical support and decided to refer her to a special school for children with learning difficulties, pointing out that the special support measures could not be made available at the school concerned. The issue before the Court was the constitutionality of the decision of the Higher Administrative Court which had confirmed the referral to the special school. The applicant contended that the referral violated article 3 of the German Basic Law, which states *inter alia* that nobody must be disadvantaged on the basis of his disability.

The Court held that disadvantagement exists not only where a disabled person is denied admission to a public institution, where this is factually possible, or where he is denied a service of the state, to which everybody is in principle entitled. Disadvantagement may also exist where a disabled person is excluded from opportunities of activity or personal development which are generally available, because his disability is not compensated for through special support measures.[181] The Court then commented as follows on the education of disabled persons:

> According to the current state of pedagogical knowledge, a general exclusion of the possibility of a joint education and instruction of disabled with non-disabled pupils can at this point not be constitutionally justified.[182]

The Court stated that the referral of a disabled pupil to a special school did not *per se* amount to a prohibited disadvantagement. A prohibited disadvantagement would, however, exist not only where the pupil is referred to such a school although his education at an ordinary school is possible without this placing a special burden on financial and human resources, but also where he is referred to such a school although his education at an ordinary school could be assured by taking special pedagogical support measures, considered reasonable in the circumstances. Such measures could include setting up an integration class or making available the services of a pedagogical assistant. All this shows that schools may be expected to

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[181] *Ibidem* at p. 303.

[182] *Ibidem* at p. 304. Own translation from original German text, "Nach dem gegenwärtigen pädagogischen Erkenntnisstand ließe sich ein genereller Ausschluß der Möglichkeit einer gemeinsamen Erziehung und Unterrichtung von behinderten Schülern mit nichtbehinderten derzeit verfassungsrechtlich nicht rechtfertigen".

take substantial measures to adapt to the needs and abilities of disabled pupils. At the same time, however, there are limits on what may be expected of schools in this regard. The Court stressed that in determining whether or not a referral to a special school constituted a prohibited disadvantagement, all relevant factors had to be considered, including the nature and severity of the disability, the advantages and disadvantages of attendance at an ordinary and a special school, respectively, for the disabled pupil, the strain an integrated education puts on teachers and students, and restraints on financial, human, technical and organisational resources.[183]

In the light of these observations and with regard to the facts of the case, the Court *in casu* decided that the Higher Administrative Court's confirmation of the referral to the special school did not amount to a violation of article 3 German Basic Law. The extensive special pedagogical support needed by the applicant and the state's inability to provide such support within the framework of the resources at its disposal at the school concerned were crucial to the resolution of the case.

4.1.4.2. *Working children*

Education must also be flexible so that it can adapt to the special situation of *working children.*[184] It has already been stated that it is a major concern of the ILO that education should be compulsory until the child reaches the age of at least 15, and that the minimum age for admission to employment should be related to the age when compulsory education is completed.[185] The cruel reality, however, is that full-time compulsory education until the stated age appears to be a luxury rather than a basic right for children, who must work so that they and their families may be able to survive. Against this background, and until the root causes of child labour have been addressed more successfully, opportunities for working children to "learn and earn" should, therefore, be created. If it is not possible to "bring children to where education is given", education must be adapted so that "it can be brought to where children are". A bold step, which could serve as a blueprint for similar efforts in other countries, has been taken by the Supreme Court of India in the case of *Mehta v. State of Tamil Nadu.*[186] The Court accepted the "learn and earn" approach for non-hazardous employment of children below 14 years of age. It stated that it would have to be seen that "the working hours of the child are not more

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[183] *Ibidem* at pp. 306–308.

[184] On the criterion of the "adaptability" of education and the special situation of working children, see Tomaševski, 2001e, pp. 33–34.

[185] See 6.3.2.2. *supra.*

[186] *M.C. Mehta v. State of Tamil Nadu and Others*, Supreme Court of India, Judgement of 10 December 1996, Writ Petition (C) No. 465 of 1986.

than four to six hours a day and it receives education at least for two hours each day" and that "[i]t would also [have to] be seen that the entire cost of education is borne by the employer".[187] With regard to hazardous employment of children in the said age group, the Court proposed the following model: The state should withdraw these children from employment and assure their education in appropriate institutions. It should try to ensure work for an adult member of the family of a child withdrawn from work. It should further guarantee the provision of a minimum income to the family (deriving from funds contributed by the offending employer and, where it does not ensure work for an adult member of the family, also the state), to enable the family to send the child to school, and payable as long as the child is actually attending school.[188]

Now that the idea that education must be available, accessible, acceptable and adaptable has been discussed, article 13(2)(a) to (e) ICESCR on primary, secondary, higher and fundamental education, and developing a system of schools, establishing a fellowship system and improving the material conditions of teaching staff, respectively, will be analysed.

4.2. *Article 13(2)(a) ICESCR: Primary Education*

Article 13(2)(a) ICESCR[189] states:

> 2. The States Parties to the present Covenant recognise that, with a view to achieving the full realisation of [the right to education]:
> (a) Primary education shall be compulsory and available free to all.

4.2.1. *The Meaning of "Primary Education"*

The CESCR, in paragraph 9 General Comment No. 13,[190] remarks that it "obtains guidance on the proper interpretation of the term 'primary education' from the World Declaration on Education for All".[191] It refers to articles 1(1) and 5 of the Declaration. Article 5 states *inter alia*:

> The main delivery system for the basic education of children outside the family is primary schooling. Primary education must be universal, ensure that the basic learning needs of all children are satisfied, and take into account the culture, needs and opportunities of the community.

Article 1(1), in turn, defines "basic learning needs":

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[187] *Ibidem* at para. 31.
[188] *Ibidem* at paras. 27–31.
[189] On art. 13(2)(a) ICESCR, see Gebert, 1996, pp. 364–373.
[190] See note 2.
[191] The World Declaration on Education for All has been adopted by the World Conference on Education for All, held at Jomtien, Thailand from 5–9 March 1990.

> These needs comprise both essential learning tools (such as literacy, oral expression, numeracy, and problem solving) and the basic learning content (such as knowledge, skills, values, and attitudes) required by human beings to be able to survive, to develop their full capacities, to live and work in dignity, to participate fully in development, to improve the quality of their lives, to make informed decisions, and to continue learning.

Primary education includes the elements of availability, accessibility, acceptability and adaptability.[192] It further has two distinctive features: it is "compulsory" and "free".[193]

In clarifying the meaning of "primary education", reference may also be made to UNESCO's *International Standard Classification of Education* (*ISCED*), approved by UNESCO's General Conference in 1997. The main purpose of this document is to serve as an instrument suitable for presenting statistics of education both within countries and internationally. In terms of ISCED, the main criterion of primary education is that it is the beginning of systematic apprenticeship of reading, writing and mathematics. The age of entrance is not younger than five or older than seven years. Primary education covers six years of full-time schooling. It is the start of compulsory education.[194]

4.2.2. *Primary Education Must Be "Compulsory"*

The CESCR has commented as follows on the requirement of "compulsory" education:

> The element of compulsion serves to highlight the fact that neither parents, nor guardians, nor the State are entitled to treat as optional the decision as to whether the child should have access to primary education. Similarly, the prohibition of gender discrimination in access to education, required also by articles 2 and 3 of the Covenant, is further underlined by this requirement. It should be emphasised, however, that the education offered must be adequate in quality, relevant to the child and must promote the realisation of the child's other rights.[195]

"Compulsory" education entails obligations at two levels: On the one hand, states parties must ensure that enough schools are available so that all children of primary school age can go to school. On the other hand, parents must not keep their children away from school and must secure their attendance at school. The latter duty may be said to restrict the right of parents to freely decide on their children's education. This is justifiable, however,

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[192] General Comment No. 13, see note 2, para. 8.
[193] *Ibidem* at para. 10.
[194] UNESCO *International Standard Classification of Education* (*ISCED*) (1997), paras. 45–51.
[195] General Comment No. 11, see note 1, para. 6.

from the perspective of "the best interests of the child" and also that of the interest of society that everybody should acquire a minimum level of education. Compulsory education and its restriction of parental rights should, nevertheless, not be seen as sanctioning a state monopoly in education. This is where article 13(3) ICESCR becomes important. It guarantees the liberty of parents to send their children to private schools.[196]

The requirement of "compulsory" education obliges states parties to enact laws which make primary education compulsory. The question, however, is how to secure compliance with compulsory education. Article 5(d) ECHR authorises "the detention of a minor by lawful order for the purpose of educational supervision". This provision provides for compulsory education in the narrowest sense of the term. In some states, the offence of "truancy" has been created to punish children for breaching the duty to attend school. Other approaches target parents in the form of fines for their failure to secure their children's attendance at school. It has, however, been stated that rather than *enforcing*, states should *encourage* school attendance.[197] One way of doing so, is to ensure that schools are child-friendly and provide education which is relevant to the child's needs. This would go some way to discouraging non-attendance. Additionally, however, measures need to be taken to remove financial obstacles impeding access to primary education. Financial obstacles are a significant reason why parents do not send their children to school.

4.2.3. *Primary Education Must Be "Free"*

Making primary education "compulsory" is contingent on making it "free". Parents cannot be obliged to send their children to school, if they cannot afford the costs of schooling.[198] It is for this reason that article 13(2)(a) requires primary education to be "available free to all". The requirement of "free" education applies unconditionally. States parties may, therefore, not introduce study fees for certain categories of students, for example, those whose parents are financially better off. Also the establishment of study bursary schemes does not constitute a satisfactory realisation of the

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[196] See Gebert, 1996, pp. 365–366. It should be realised that compulsory education does not *per se* forbid home schooling, as compulsory education need not necessarily take place at a school.

[197] See Tomaševski, 1999a, para. 77 (UN Doc. E/CN.4/1999/49). See also Van Bueren, 1995, pp. 238–239, who rejects "the traditional methods" for dealing with non-attendance, such as the use of disciplinary measures or the creation of the offence of truancy, and argues in favour of "alternative strategies" aimed at ensuring attendance. Art. 28(1)(e) CRC obliges states parties to "[t]ake measures *to encourage* regular attendance at schools and the reduction of drop-out rates". Author's italics.

[198] See Tomaševski, 2002a, para. 12 (UN Doc. E/CN.4/2002/60).

requirement of "free" education, as study bursaries are usually granted only in the case of need, however defined.[199] It should further be noted that free primary education must, first and foremost, be guaranteed in state schools. Article 13(2)(a) should not be seen as conferring a general claim that states parties grant financial assistance to parents to enable them to send their children to private schools, or that states parties subsidise private schools.[200]

It is important to determine the ambit of the principle of free education. The CESCR has commented as follows in this regard:

> The nature of this requirement is unequivocal. The right is expressly formulated so as to ensure the availability of primary education without charge to the child, parents or guardians. Fees imposed by the Government, the local authorities or the school, and other direct costs, constitute disincentives to the enjoyment of the right and may jeopardise its realisation. They are also often highly regressive in effect. . . . Indirect costs, such as compulsory levies on parents (sometimes portrayed as being voluntary, when in fact they are not), or the obligation to wear a relatively expensive school uniform, can also fall into the same category. Other indirect costs may be permissible, subject to the Committee's examination on a case-by-case basis. . . .[201]

The Committee makes it clear that schools must refrain from charging study fees, *i.e.* fees which must be paid in order to gain admission to a school. The Committee further holds that, whereas the requirement of "free" education covers "other direct costs", "indirect costs" may or may not be covered. Concerning "indirect costs", the Committee probably has in mind that factors, such as a state party's level of development or the ability of parents to bear such costs, would have to be taken into account in determining whether these costs are legitimate. In this regard, the Committee reserves the right to make a final determination. Unfortunately, the Committee does not define the terms "other direct costs" and "indirect costs". In the past, the Committee has considered costs related to textbooks, stationery, teaching materials, educational facilities, meals and school uniforms, compulsory parental contributions, and additional material costs and informal fees not to be acceptable.[202] Apart from fees, direct costs and

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[199] See Gebert, 1996, p. 367.

[200] It is submitted, however, that states parties should bear certain duties concerning the financing of private education. In this respect, see the comments made at 10.5.1.4. and 10.5.2.2. *infra* on the suggested approach for international law to the issue of public financing of private education.

[201] General Comment No. 11, see note 1, para. 7.

[202] See Gebert, 1996, pp. 368–369 and 11.2.4. *infra.* The Special Rapporteur on the Right to Education has argued that the following costs with regard to primary education are unacceptable: 1. School fees (user charges, registration fees, tuition fees) charged for enrolment, tuition and examinations. 2. School fees in different guises. In many countries,

unacceptable indirect costs, which states parties are obliged to eliminate without delay, there is another financial obstacle to free education. The reference here is to the so-called opportunity costs of education. These are the costs poor families have to bear, where they send children to school, in this way dispensing with the children's contribution to the family's survival through their labour. Article 13(2)(a) should be read to oblige states parties to take steps to progressively eliminate this obstacle. They may do so by devising means of combining school and work or by paying subsidies to poor families.[203]

4.2.4. *The Implementation of Article 13(2)(a) ICESCR: The Importance of Article 14 ICESCR*

It has already been explained that where a state party has not yet established an educational infrastructure which provides for compulsory and free primary education, article 13(2)(a) is primarily addressed to the legislative and administrative organs of government, which must then plan and take the measures necessary to have the said infrastructure put in place. Where a state party has already set up such an infrastructure, however, article 13(2)(a) is addressed to the judiciary in certain respects, as, in this case, the concepts "compulsory" and "free" are sufficiently precise to be susceptible to judicial determination. Where a school denies admission to certain children, or where it requires them to pay school fees, one deals with justiciable issues.[204]

Article 14 ICESCR is of special importance with regard to the implementation of article 13(2)(a), in as far as states parties, which have not yet made compulsory and free primary education available, are concerned. The provision calls upon such states parties to adopt a plan of action in which they set out how they envisage realising compulsory and free primary education. Among the rights provisions in Part III ICESCR, article 14 is unique in that it is the only provision which does not formulate a material guarantee, but which lays down technical instructions for implementation. It has been created primarily in recognition of UNESCO's interest

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"[w]here education is tuition free, charges are levied for the use of educational facilities and materials (such as laboratories, computers or sports equipment), or for extracurricular activities (such as excursions or sports), or generally for supplementing teachers' salaries or school maintenance". Schools levy the charges concerned, for example, because there is a lack of government funding of public schools. 3. Direct expenditures, including the costs of textbooks, supplies and equipment (notebooks, sketchbooks, pens and pencils), transportation, meals and school uniforms. See Tomaševski, 2004a, para. 26 (UN Doc. E/CN.4/2004/45).

[203] See Tomaševski, 2004a, para. 22 (UN Doc. E/CN.4/2004/45).

[204] See 9.2.2.5.2. *supra.*

in having at its disposal a precise implementation norm in the Covenant itself.[205]

Article 14 requires each state party which has not been able to secure compulsory primary education, free of charge, to undertake, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory primary education free of charge for all. The requirements of article 14 have been interpreted by the CESCR in General Comment No. 11.[206] In what follows, the Committee's views should briefly be referred to.[207]

The Committee holds with regard to the requirement that a plan of action must be adopted "within two years" that

> [t]his must be interpreted as meaning within two years of the Covenant's entry into force of the State concerned, or within two years of a subsequent change in circumstances which has led to the non-observance of the relevant obligation. This obligation is a continuing one and States parties to which the provision is relevant by virtue of the prevailing situation are not absolved from the obligation as a result of their past failure to act within the two-year limit.[208]

With regard to the plan of action itself, the Committee states that

> [t]he plan must cover all of the actions which are necessary in order to secure each of the requisite component parts of the right and must be sufficiently detailed so as to ensure the comprehensive realisation of the right. Participation of all sections of civil society in the drawing up of the plan is vital and some means of periodically reviewing progress and ensuring accountability are essential.[209]

In General Comment No. 11, the Committee also points out that the obligation to adopt a plan of action cannot be avoided on the grounds that the necessary resources are allegedly not available, and emphasises that the said obligation applies "almost by definition, to situations characterised by inadequate financial resources". If a state party is clearly lacking in the financial resources and/or expertise required to adopt a plan, "the international community has a clear obligation to assist".[210]

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[205] See Gebert, 1996, pp. 369–370.

[206] CESCR, General Comment No. 11 (Twentieth Session, 1999) [UN Doc. E/2000/22] Plans of action for primary education (art. 14 ICESCR) [*Compilation*, 2004, pp. 60–63]. The full text of the General Comment is included in the Annex to this book.

[207] The meaning which the CESCR has given to the terms "compulsory" and "free of charge" in paras. 6 and 7 General Comment No. 11, see note 206, has already been referred to at 10.4.2.2. and 10.4.2.3., respectively, *supra*.

[208] General Comment No. 11, see note 206, para. 8.

[209] *Idem*.

[210] *Ibidem* at para. 9. See also at para. 3.

The Committee further stresses that although article 14 states that the plan of action must be aimed at securing "the progressive implementation" of the right to compulsory and free primary education, article 14 also specifies that the target date must be "within a reasonable number of years" and that the time-frame must "be fixed in the plan". The Committee considers this to require the plan to "specifically set out a series of targeted implementation dates for each stage of the progressive implementation of the plan". In the opinion of the Committee, "[t]his underscores both the importance and the relative inflexibility of the obligation in question".[211]

The Committee, finally, calls upon all states parties to which article 14 is relevant "to ensure that its terms are fully complied with and that the resulting plan of action is submitted to the Committee as an integral part of the reports required under the Covenant".[212]

It has already been explained that the notion of progressiveness in article 2(1) applies to primary education in article 13(2)(a) in a more limited sense.[213] This is in a large measure the result of article 14. Article 14 limits the progressive realisation of compulsory and free primary education to two years plus additionally a reasonable number of years which must be clearly specified. The effect of article 14, therefore, is "to accelerate" the principle of progressive realisation in article 2(1).[214] This means that there exists a high degree of urgency of realisation for primary education.[215]

4.3. *Article 13(2)(b) ICESCR: Secondary Education*

Article 13(2)(b) ICESCR[216] states:

> 2. The States Parties to the present Covenant recognise that, with a view to achieving the full realisation of [the right to education]:
>
> (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education.

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[211] *Ibidem* at para. 10.
[212] *Ibidem* at para. 11.
[213] See 4.3.2. and 9.2.2.4. *supra.*
[214] See Gebert, 1996, pp. 370–371.
[215] Para. 51 General Comment No. 13, see note 2, thus underlines that "[s]tates parties are obliged to prioritise the introduction of compulsory, free primary education" and that "[t]his interpretation of article 13(2) is reinforced by the priority accorded to primary education in article 14".
[216] On art. 13(2)(b) ICESCR, see Gebert, 1996, pp. 397–405.

4.3.1. *The Meaning of "Secondary Education"*

The CESCR, in paragraph 12 General Comment No. 13,[217] observes that "[w]hile the content of secondary education will vary among States parties and over time, it includes completion of basic education and consolidation of the foundations for lifelong learning and human development" and that "[i]t prepares students for vocational and higher educational opportunities". The Committee also states that secondary education includes the elements of availability, accessibility, acceptability and adaptability.[218]

In clarifying the meaning of "secondary education", reference may also be made to UNESCO's *International Standard Classification of Education* (*ISCED*). In terms of ISCED, secondary education comprises "lower secondary education" and "upper secondary education". The main criteria of the former are that it marks the beginning of subject presentation using more qualified teachers than for primary education, and that it involves the full implementation of basic skills and lays the foundation for lifelong learning. Entry of the level is after some six years of primary education and its end is about three years later. The main criteria of the latter are that access thereto typically requires the completion of some nine years of full-time education since the beginning of primary education and that admission usually presupposes the completion of lower secondary education. The entrance age to this level is typically 15 or 16 years.[219]

Article 13(2)(b) applies to secondary education "in its different forms". In the eyes of the Committee, this recognises that secondary education "demands flexible curricula and varied delivery systems to respond to the needs of students in different social and cultural settings". The Committee also encourages "'alternative' educational programmes which parallel regular secondary school systems".[220]

4.3.2. *Secondary Education Must Be Made Generally Available and Generally Accessible*

Article 13(2)(b) makes two demands on secondary education: Education at this level must be made *generally available* and *generally accessible*.[221] These do not constitute immediate but ultimate goals, however. Article 13(2)(b) must be read with article 2(1), which provides for the progressive realisation of the rights protected in the ICESCR. The general availability and general

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[217] See note 2.
[218] General Comment No. 13, see note 2, para. 11.
[219] UNESCO *International Standard Classification of Education* (*ISCED*) (1997), paras. 52–70. On ISCED, see 10.4.2.1. *supra*.
[220] General Comment No. 13, see note 2, para. 12.
[221] These terms have been defined at 4.3.2. *supra*.

accessibility of secondary education need, therefore, not be realised immediately on becoming party to the ICESCR, but may be achieved gradually in accordance with the resources a state party has at its disposal.[222]

The requirement that secondary education be made "generally available" means that there must ultimately be enough educational facilities available for all at the secondary level. The CESCR thus states that the phrase "generally available" signifies that "secondary education will be distributed throughout the State in such a way that it is available on the same basis to all".[223]

The requirement that secondary education be made "generally accessible" means that all obstacles to admission must be eliminated. Article 13(2)(b) states that this is to be accomplished "by every appropriate means". It is thus left to states parties to decide which means they regard as appropriate. This is subject to an important exception, however. Article 13(2)(b) obliges states parties to promote the general accessibility of secondary education "in particular by the progressive introduction of free education". The ICESCR hence views the introduction of free education as the best way of making secondary education generally accessible.[224] The CESCR holds that "'progressive introduction of free education' means that while States must prioritise the provision of free primary education, they also have an obligation to take concrete steps towards achieving free secondary . . . education".[225] Other means suitable to promoting the general accessibility of secondary education include:

- making the first three years or so of secondary education compulsory;
- granting study bursaries to students in deserving cases;
- making it easier for students to move on from primary to secondary education;
- facilitating changes of "career" within the system of secondary education;
- providing accurate information to students on all forms of secondary education available; and
- respecting the language needs of students at the secondary level.

It should further be noted that access to secondary education may not be made dependent on a student's apparent capacity or ability.[226]

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[222] See Gebert, 1996, p. 398.

[223] General Comment No. 13, see note 2, para. 13.

[224] As in the case of primary education, "free" education should ideally mean not only the absence of study fees, but should also cover the absence of "other direct costs" and unacceptable "indirect costs". See 10.4.2.3. *supra.*

[225] General Comment No. 13, see note 2, para. 14.

[226] *Ibidem* at para. 13. This does not mean, however, that access to certain forms of secondary education may not be made dependent on a student's apparent capacity or abil-

Unlike article 13(2)(a), article 13(2)(b) does not mention the requirement of "compulsory" education. Reference has, however, already been made to the ILO's Minimum Age Convention, 1973. In terms of article 2 of the Convention, states parties must specify a minimum age for admission to employment which may not be less than the age of completion of compulsory schooling and, in any case, not less than 15 years. Article 2 appears to imply that education should be compulsory, at least, until the child reaches the age of 15. Compulsory education thus construed would also cover the period of "lower secondary education" (the seventh to the ninth year of schooling).[227] Article 13(2)(b), it is submitted, should be interpreted in accordance with this rendering of compulsory education. In other words, states parties should be held to be obliged to make "lower secondary education" progressively compulsory.[228]

4.3.3. *Technical and Vocational Education*

Article 13(2)(b) envisages a system of secondary education which makes available education at the said level "in its different forms". Particular mention is made of technical and vocational education (TVE). This underscores the importance of TVE at this level of education.[229] It should be noted, however, that TVE forms an integral part of all levels of education. This is also emphasised by the CESCR, which, to substantiate its claim, points out that TVE also forms an element of the right to work, protected in article 6(2) ICESCR, but that the latter provision does not refer to TVE in relation to a specific level of education.[230] Article 6(2) comprehends that TVE has a wider role. Under article 6(2), TVE must, with a view to realising the right to work, be made available "to achieve steady economic, social and cultural development and full and productive employment".[231]

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ity. States parties may justifiably restrict access to secondary schools preparing students for university admission, schools or colleges of art, technical schools or colleges, or schools for gifted students, to those students which possess the required capacity, knowledge or talent. See Wildhaber, 1986/2000, p. 17, para. 54.

[227] See 6.3.2.2. *supra.*

[228] This would also take account of actual state practice. In the majority of countries for which data are available, compulsory education has been extended beyond primary education. See the table reproducing such data in Tomaševski, 2000a, p. 18 (UN Doc. E/CN.4/2000/6). According to Tomaševski, the trend of lengthening compulsory education follows a double rationale: On the one hand, it prevents children from venturing into adulthood too early (be it employment or marriage). On the other hand, it provides all children with a common core education which is increasingly demanded by the emergence of knowledge-based societies and economies. See at para. 46.

[229] General Comment No. 13, see note 2, para. 15.

[230] *Ibidem* at para. 15.

[231] Art. 26(1) UDHR also does not refer to TVE in relation to a specific level of education.

TVE may be defined as

> all forms and levels of the educational process involving, in addition to general knowledge, the study of technologies and related sciences and the acquisition of practical skills, know-how, attitudes and understanding relating to occupations in the various sectors of economic and social life.[232]

In paragraph 15 General Comment No. 13,[233] the CESCR states that it considers TVE, understood as defined above, to include the following aspects:

(a) It enables students to acquire knowledge and skills which contribute to their personal development, self-reliance and employability and enhances the productivity of their families and communities, including the State party's economic and social development;
(b) It takes account of the educational, cultural and social background of the population concerned; the skills, knowledge and levels of qualification needed in the various sectors of the economy; and occupational health, safety and welfare;
(c) Provides retraining for adults whose current knowledge and skills have become obsolete owing to technological, economic, employment, social or other changes;
(d) It consists of programmes which give students, especially those from developing countries, the opportunity to receive TVE in other States, with a view to the appropriate transfer and adaptation of technology;
(e) It consists, in the context of the Covenant's non-discrimination and equality provisions, of programmes which promote the TVE of women, girls, out-of-school youth, unemployed youth, the children of migrant workers, refugees, persons with disabilities and other disadvantaged groups.

Content has been given to article 13(2)(b) by two legal instruments adopted by UNESCO, namely, the Revised Recommendation concerning Technical and Vocational Education of 2001 and the Convention on Technical and Vocational Education of 1989. Both these instruments have been discussed above and the reader is referred to the relevant section of this book.[234]

4.3.4. *The Implementation of Article 13(2)(b) ICESCR*

Article 13(2)(b) is primarily addressed to the legislative and administrative organs of government. These must plan and take the necessary steps to make secondary education available and accessible. States parties have an immediate obligation "to take steps" towards the realisation of secondary education in article 13(2)(b). At a minimum, they must adopt and imple-

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[232] Art. 1(a) UNESCO Convention on Technical and Vocational Education.
[233] See note 2.
[234] See 6.2.2.2. *supra.*

ment a national educational strategy which includes the provision of secondary education. The strategy should include mechanisms, such as indicators and benchmarks, by which progress can be closely monitored.[235] To the extent, however, that a state party has put in place a system of secondary education, article 13(2)(b) is also addressed to the judiciary. Where, for example, a national law guarantees free secondary education, free education may be judicially enforced. Similarly, where someone is denied access to available secondary education on discriminatory grounds, the matter may be brought before a court of law.[236]

4.4. *Article 13(2)(c) ICESCR: Higher Education*

Article 13(2)(c) ICESCR[237] states:

> 2. The States Parties to the present Covenant recognise that, with a view to achieving the full realisation of [the right to education]:
>
> (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education.

4.4.1. *The Meaning of "Higher Education"*

In clarifying the meaning of "higher education", reference should be made to UNESCO's *International Standard Classification of Education* (*ISCED*). In terms of ISCED, higher or tertiary education involves two stages: a first stage not leading directly to an advanced research qualification, and a second stage leading to an advanced research qualification. The former consists of programmes with an educational content more advanced than those of upper secondary education. Entry to these programmes normally requires the successful completion of upper secondary education. Education at this stage may *either* be theoretically based and intended to provide the qualifications for entry into advanced research programmes and professions with high skills requirements *or* practically oriented/occupationally specific and mainly designed for participants to acquire the practical skills and know-how needed for employment in a particular occupation or trade. The latter has a research oriented content, and entails submission of a thesis or dissertation.[238]

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[235] General Comment No. 13, see note 2, para. 52.

[236] Also the introduction or increase of study fees in secondary education should be considered justiciable. See 9.2.2.5.2. *supra*.

[237] On art. 13(2)(c) ICESCR, see Gebert, 1996, pp. 421–429.

[238] UNESCO *International Standard Classification of Education* (*ISCED*) (1997), paras. 80–106. On ISCED, see 10.4.2.1. *supra*.

It will be noted that, unlike article 13(2)(b), article 13(2)(c) does not include a reference to either education "in its different forms" or specifically to TVE. The CESCR considers these two omissions only to reflect a difference of emphasis between article 13(2)(b) and (c). In the opinion of the Committee, also higher education must be available "in different forms", because "[i]f higher education is to respond to the needs of students in different social and cultural settings, it must have flexible curricula and varied delivery systems, such as distance learning". Similarly, and again relying on article 6(2) ICESCR,[239] the Committee deems TVE to form an integral component also of higher education.[240]

The Committee further comments that higher education includes the elements of availability, accessibility, acceptability and adaptability.[241]

4.4.2. *Higher Education Must Be Made "Equally Accessible to All, on the Basis of Capacity"*

Article 13(2)(c) obliges states parties to make higher education "equally accessible to all, on the basis of capacity". Unlike article 13(2)(b), article 13(2)(c) does not refer to the availability of education. This should not be read as exempting states parties from making higher education available. It only means that such education need not be made *generally* available. Because states parties are not required to make higher education generally available, *i.e.* available to all, the ICESCR implicitly accepts that states parties comply with the Covenant if higher education is also not generally accessible, *i.e.* accessible to all.[242] In these circumstances, however, states parties must ensure that access to higher education is equitable. To select those students which should gain admission to institutions of higher education, article 13(2)(c), therefore, lays down the objective criterion of "capacity". Additionally, article 13(2)(c) requires higher education to be "equally" accessible to all.

Article 13(2)(c) must be read with article 2(1), which provides for the progressive realisation of the rights protected in the ICESCR. The availability and accessibility of higher education need, therefore, not be realised immediately on becoming party to the ICESCR, but may be achieved gradually in accordance with the resources a state party has at its disposal.

Like article 13(2)(b), article 13(2)(c) directs states parties to promote the accessibility of education "by every appropriate means", thus leaving it to

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[239] See 10.4.3.3. *supra.*
[240] General Comment No. 13, see note 2, para. 18.
[241] *Ibidem* at para. 17.
[242] Ultimately, higher education can only be accessible to all, if it is also available to all.

states parties to decide which means they regard as appropriate. But, again, this is subject to the important exception that accessibility must be promoted "in particular by the progressive introduction of free education". Whereas states parties must prioritise the provision of free primary education, they also have an obligation to take concrete steps towards achieving free higher education.[243] Other means suitable to promoting the accessibility of higher education include:

- granting study bursaries to students in deserving cases;
- facilitating access to university via different paths, *i.e.* not only by virtue of passing the school-leaving exam;
- providing accurate information to students on all forms of higher education available; and
- increasing the opportunities for distance education.

4.4.3. *The Requirement that Higher Education Be "Equally" Accessible*

Institutions of higher education often have only a limited number of admission seats available. For this reason, states parties must give special attention to ensuring that higher education is "equally" accessible. The requirement constitutes an affirmation of article 2(2) ICESCR, discussed above.[244] It neither adds to, nor does it subtract from, the obligations arising under article 2(2).[245] This means that non-discriminatory distinctions under article 2(2) also do not amount to discrimination in terms of article 13(2)(c). Furthermore, in the same way that article 2(2) covers not only "active", but also "static" discrimination,[246] so does article 13(2)(c). In other words, states parties must not only remove legal and administrative provisions which discriminate on grounds such as religion, race or gender as regards access to higher education. They must also take steps to promote equality of opportunity and treatment as regards access to higher education. Steps should, in particular, be taken to advance the position of disadvantaged groups, such as women or minorities, in this regard. States parties should thus initiate special positive programmes aimed at developing the "capacity" of members of such groups, so as to increase their chances of being admitted to institutions of higher education.[247]

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[243] General Comment No. 13, see note 2, para. 20 read with para. 14.
[244] See 9.3. *supra.*
[245] See also Gebert, 1996, pp. 426–427.
[246] See 9.3.1. *supra.*
[247] A more difficult question concerns the acceptability of quota systems in higher education. This has been discussed at 9.3.2.3. *supra.*

4.4.4. *The Requirement that Higher Education Be Accessible "on the Basis of Capacity"*

Within the framework of article 13(2)(c), the criterion of "capacity" is relevant in two different contexts. On the one hand, it is the criterion to be applied to restrict access to higher education to those students which possess the required potential to complete studies at the higher level. On the other hand, it is the criterion to be applied where states parties wish to restrict the number of students gaining admission to particular fields of study at the tertiary level. In the former instance, "capacity" constitutes a *qualitative* criterion of restriction on admission, in the latter instance, a *quantitative* criterion of restriction on admission.[248]

As a *qualitative* criterion, "capacity" refers to the intellectual ability of applicants. As such, the criterion would seem not to cover requirements concerning character or state of health.[249] From the perspective of article 13(2)(c), the following methods of ascertaining a student's capacity would seem to be acceptable: proof of the successful completion of prior education (for admission to university a school-leaving exam, and for admission to TVE at the higher level evidence of the successful completion of vocational training or an apprenticeship), oral and/or written entrance examinations, occupational experience, an interview, a period of probation, or a combination of the mentioned methods.[250] In addition to the ability to complete certain studies, "capacity" may, with regard to certain professions, such as pedagogical professions, probably also include the ability to successfully exercise these professions, so that methods to ascertain this ability would seem to be permissible.[251]

As a *quantitative* criterion, the "capacity" of a student is the criterion to be applied where states parties wish to restrict the number of students gaining admission to particular fields of study at the higher level. States parties may wish to restrict the number of students for various reasons, some of which are acceptable in the context of article 13(2)(c), and some of which are not. States parties may, for example, not restrict student numbers in an attempt to take account of the demands of the labour market. Such a step would limit access to higher education, whereas the duty in article 13(2)(c) is to promote the accessibility of higher education "by every appropriate means".[252] States parties may, however, justifiably restrict the

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[248] These terms are used and discussed by Gebert, 1996, pp. 432–449.

[249] Gebert, 1996, pp. 461–462 considers that requirements concerning character or state of health probably exceed the meaning of the term "capacity" in art. 13(2)(c).

[250] See Gebert, 1996, p. 461.

[251] See *idem*.

[252] See *ibidem* at pp. 463–464.

number of students to be admitted, with regard to fields of study for which the number of admission seats available in institutions of higher education is limited.[253] A limited intake capacity of institutions at this level is, in fact, expected to be the situation likely to prevail in higher education, as is clearly borne out by the very structure of article 13(2)(c), discussed above.[254] A restriction on access interferes with the individual's freedom to plan his life, seeing that higher education increasingly prepares persons for particular professions and that a refusal to commence the desired studies amounts to denying the subsequent exercise of the chosen profession. In the type of situation under discussion, it is, however, justifiable, because state resources often do not suffice to make higher education accessible to all. In deciding on the acceptability of restricting student numbers in the type of situation concerned, the German Federal Constitutional Court[255] has thus stated:

> Although ESCR are not restricted to what is already available in each instance, they are, nevertheless, subject to what is feasible, *i.e.* to what the individual may reasonably claim from society.[256]

In order to be permissible, however, the restriction must comply with two requirements: Firstly, it must be formulated in such a way that the existing intake capacity of institutions of higher education is fully exhausted and, secondly, it must provide that the selection of students occurs "on the basis of capacity".[257] The CESCR states that "[t]he 'capacity' of individuals should be assessed by reference to all their relevant expertise and experience".[258] In other words, selection criteria, such as purely administrative criteria, the drawing of lots or age, do not comply with article 13(2)(c). Against that, selection which is based on an aptitude test or the successful completion of a practical period would comply with article 13(2)(c).

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[253] See *idem*. The acceptability of restrictions on student numbers where the number of admission seats in higher education is limited has been confirmed in the context of art. 2 P-1 ECHR. See Wildhaber, 1986/2000, pp. 19–20, paras. 63–67 and Van Dijk and Van Hoof, 1998, p. 645.

[254] See 10.4.4.2. *supra*.

[255] Numerus Clausus I *Case*, German Federal Constitutional Court, Judgement of 18 July 1972, *Entscheidungen des Bundesverfassungsgerichts*, Vol. 33, pp. 303–358.

[256] *Ibidem* at p. 333. Translation from original German text, "Auch soweit Teilhaberechte nicht von vornherein auf das jeweils Vorhandene beschränkt sind, stehen sie doch unter dem Vorbehalt des Möglichen im Sinne dessen, was der Einzelne vernünftigerweise von der Gesellschaft beanspruchen kann".

[257] *Ibidem* at p. 338.

[258] General Comment No. 13, see note 2, para. 19.

4.4.5. *The Implementation of Article 13(2)(c) ICESCR*

Article 13(2)(c) is primarily addressed to the legislative and administrative organs of government. These must plan and take the necessary steps to make higher education "equally accessible to all, on the basis of capacity". States parties must, as in the case of secondary education, immediately "take steps" aimed at realising higher education in article 13(2)(c). They must, at a minimum, adopt and implement an educational strategy which includes the provision of higher education, and which incorporates mechanisms, such as indicators and benchmarks, by which progress can be closely monitored.[259] To the extent, however, that a state party has established a system of higher education, article 13(2)(c) is also addressed to the judiciary. The question whether the requirement of "equal" access to higher education has been respected is, for example, justiciable. The requirement is closely related to the prohibition of discrimination in article 2(2), which, as has been pointed out, is judicially enforceable.[260] Similarly, a judge will be competent to adjudicate on the exact nature and scope of the requirement of access to higher education "on the basis of capacity". This does not require a decision concerning the use of state resources, but merely giving content to an imprecise legal term.[261]

4.5. *Article 13(2)(d) ICESCR: Fundamental Education*

Article 13(2)(d) ICESCR[262] states:

> 2. The States Parties to the present Covenant recognise that, with a view to achieving the full realisation of [the right to education]:
> (d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education.

4.5.1. *The Meaning of "Fundamental Education"*

Although states parties must, in terms of article 13(2)(a), ensure compulsory and free primary education for all, the reality in many countries is that there are people who have not received or completed primary education. This is a problem, particularly in underdeveloped states with insufficiently developed education systems. But, even highly developed states have to deal with the problem. As a result of the global phenomenon of

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[259] *Ibidem* at para. 52.
[260] See 9.3.2.2. *supra.*
[261] Also the introduction or increase of study fees in higher education should be considered justiciable. See 9.2.2.5.2. *supra.*
[262] On art. 13(2)(d) ICESCR, see Gebert, 1996, pp. 465–472.

migration, many people with no or only limited education from poorly developed countries eventually find themselves in more affluent countries. In view of the core nature of primary education, article 13(2)(d) obliges states parties to promote for all those who have not received or completed primary education the opportunity to receive education equivalent to that normally provided at the primary level. Fundamental education must be clearly distinguished from primary education. Whereas the latter means formal schooling for children of primary school age, the former means education offered to children, youth and adults, which replaces primary education not received or completed, and which is offered outside the regular primary education system.

If fundamental education is to replace primary education which has not been received or completed, the content of fundamental education must largely correspond to that of primary education. Primary education has above been defined in the light of the World Declaration on Education for All.[263] It has been stated that primary education refers to education which satisfies "basic learning needs",[264] these learning needs comprising essential learning tools (such as literacy, oral expression, numeracy and problem solving) and the basic learning content (such as knowledge, skills, values and attitudes) required to be able to survive, to develop one's full capacities, to live and work in dignity, to participate fully in development, to improve the quality of one's life, to make informed decisions and to continue learning.[265] This must be regarded to be the content of fundamental education as well. This is also the view of the CESCR, which states that "[i]n general terms, fundamental education corresponds to basic education as set out in the World Declaration on Education for All".[266] Guidance on what constitutes the content of fundamental education may further be obtained from section 16 of UNESCO's Recommendation on the Development of Adult Education of 1976, which provides that adult education activities should be designed for illiterate persons or persons with limited education,

- to enable them to acquire basic knowledge (reading, writing, arithmetic, basic understanding of natural and social phenomena);
- to make it easier for them to engage in productive work;
- to promote their self-awareness and their grasp of the problems of hygiene, health, household management and the upbringing of children; and

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[263] See 10.4.2.1. *supra.*
[264] Art. 5 World Declaration on Education for All.
[265] Art. 1(1) World Declaration on Education for All.
[266] General Comment No. 13, see note 2, para. 22.

- to enhance their autonomy and increase their participation in community life.

Fundamental education thus entails not only instruction in reading and writing, but includes education concerning the world of work, practical life and values as well.[267] The content of fundamental education should now also be established having regard to the Hamburg Declaration on Adult Learning and Agenda for the Future, adopted at the Fifth International Conference on Adult Education, convened by UNESCO and held at Hamburg, Germany from 14 to 18 July 1997. This means essentially that approaches to fundamental education should be inspired by the concept of "learning throughout life".

It may be asked whether article 13(2)(d) also covers education for persons who have actually received and completed primary education, but who are, nevertheless, in the same situation as persons who have not, in fact, received or completed it. Persons who have completed primary education may, despite this fact, not have acquired a solid elementary education, or they may through the years have forgotten the knowledge acquired during primary education. Such persons are said to be "functionally illiterate". "Functional illiteracy" describes the inability of persons who have completed their formal education to successfully participate in all those activities of a group or culture which presuppose the ability to read and write. It has been argued that an interpretation of the ICESCR which seeks to promote the effective protection of Covenant rights must regard article 13(2)(d) as also covering education for the functional illiterate. It is a fundamental concern of article 13(2) that every person should acquire a solid elementary education, because this is required to fulfil the tasks of everyday life. Accordingly, the reason why someone has not acquired such an education should not play a role in determining whether or not he is entitled to fundamental education under article 13(2)(d).[268] This view should be supported. It is, in fact, also held by the CESCR, which states:

> Since everyone has the right to the satisfaction of their "basic learning needs" as understood by the World Declaration, the right to fundamental education is not confined to those "who have not received or completed the whole period of their primary education". The right to fundamental education extends to all those who have not yet satisfied their "basic learning needs".[269]

It needs to be emphasised that enjoyment of the right to fundamental education under article 13(2)(d) is not limited by age—"it extends to children,

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[267] See Gebert, 1996, p. 467.
[268] See *ibidem* at pp. 470–471.
[269] General Comment No. 13, see note 2, para. 23.

youth and adults, including older persons". Therefore, "curricula and delivery systems must be devised which are suitable for students of all ages".[270] As the CESCR correctly observes, fundamental education for adults is "an integral component of adult education".[271] "Adult education" is, however, a wider concept than "fundamental education", as it covers not only education for adults which replaces initial education, but also education for adults beyond such education.[272] Both these aspects are dealt with by UNESCO's Recommendation on the Development of Adult Education of 1976 and the Hamburg Declaration on Adult Learning and Agenda for the Future of 1997, these instruments having been discussed above.[273]

It should finally be noted that, in terms of paragraph 21 General Comment No. 13,[274] fundamental education includes the elements of availability, accessibility, acceptability and adaptability.

4.5.2. *Fundamental Education Must Be Encouraged or Intensified as Far as Possible*

Article 13(2)(d) obliges states parties "to encourage or intensify" fundamental education "as far as possible". Article 13(2)(d), in fact, enjoins states parties to advance the availability and accessibility of fundamental education. They are called upon to do so "as far as possible". This highlights that states parties are expected to make every effort to make fundamental education available and accessible. However, the obligation does not reach as far as to require that such education be made generally available and generally accessible. It will further be noted that whereas the UDHR still demanded that fundamental education be free, the ICESCR does not include this requirement. Neither is there a reference to the progressive introduction of free education. It appears that article 13(2)(d) seeks not to overburden economically weak states parties. It is submitted, however, that although states parties are not legally compelled to make fundamental education free, they should nonetheless do so. After all, introducing free

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[270] *Ibidem* at para. 24.

[271] *Idem*.

[272] Adult education beyond initial education seems not to be covered by art. 13(2)(d). This is suggested by a reading of the equivalent provision of the CDE, which expressly covers such education. Art. 4(c) CDE obliges states parties "[t]o encourage and intensify by appropriate methods the education of persons who have not received any primary education or who have not completed the entire primary education course *and the continuation of their education on the basis of individual capacity*" [author's italics].

[273] See 6.2.2.5. *supra*. Sect. 1 of the Recommendation defines the term "adult education". To the extent that the Recommendation provides for adult education which replaces initial education, it may be seen to give content to art. 13(2)(d).

[274] See note 2.

fundamental education is the most effective instrument conceivable to promote the accessibility of such education.[275]

Also article 13(2)(d) must be read with article 2(1), which provides for the progressive realisation of ICESCR rights. The availability and accessibility of fundamental education need thus not be realised immediately, but may be achieved gradually in accordance with a state party's available resources.

4.5.3. *The Implementation of Article 13(2)(d) ICESCR*

Like article 13(2)(a), (b) and (c), article 13(2)(d) is primarily addressed to the legislative and administrative organs of government, which must plan and take the necessary steps to make fundamental education available and accessible. States parties must take immediate steps in this regard. At a minimum, they must adopt and implement an educational strategy which includes the provision of fundamental education, and which incorporates mechanisms, such as indicators and benchmarks, by which progress can be closely monitored.[276] To the extent, however, that a state party has established a system of fundamental education, article 13(2)(d) is also addressed to the judiciary.

4.6. *Article 13(2)(e) ICESCR: A System of Schools, a Fellowship System and Teaching Staff*

Article 13(2)(e) ICESCR[277] states:

> 2. The States Parties to the present Covenant recognise that, with a view to achieving the full realisation of [the right to education]:
> (e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

Article 13(2)(e) instructs states parties to do three things. They must:

1. actively pursue the development of a system of schools at all levels;
2. establish an adequate fellowship system; and
3. continuously improve the material conditions of teaching staff.

Article 13(2)(e) may be said to prescribe measures a state party must take to ultimately realise an education system as envisaged by article 13(2)(a)

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[275] See Gebert, 1996, p. 471.
[276] General Comment No. 13, see note 2, para. 52.
[277] On art. 13(2)(e) ICESCR, see Gebert, 1996, pp. 486–496.

to (d). In other words, it prescribes measures aimed at promoting the availability and accessibility of education at all levels.

A few comments on each of the three requirements will now be made.

4.6.1. *Actively Pursuing the Development of a System of Schools at All Levels*

The obligation to actively pursue the development of a system of schools at all levels entails an injunction to states parties to take measures directed at setting up an educational infrastructure. This means that states parties must take steps to ensure that schools are provided at all levels, that school buildings are kept in good repair, that there are teaching materials and equipment of a high quality in schools, and that sufficient properly qualified teachers are available. These duties are all directed at enhancing *the availability* of education. In relation to article 13(2)(a) and (b), the duty to enhance the availability of education, strictly speaking, already flows from the wording of article 13(2)(a) and (b). In relation to article 13(2)(c) on higher education, however, this duty is not all that clear, as article 13(2)(c) does not refer to the availability of higher education.[278] The effect of article 13(2)(e) thus is to clearly make the requirement of availability also applicable to article 13(2)(c).[279]

In paragraph 25 General Comment No. 13,[280] the CESCR states that the requirement to actively pursue the development of a system of schools at all levels means that

> a State party is obliged to have an overall developmental strategy for its school system. The strategy must encompass schooling at all levels, but the Covenant requires States parties to prioritise primary education. . . . "[A]ctively pursued" suggests that the overall strategy should attract a degree of governmental priority and, in any event, must be implemented with vigour.

In paragraph 53, the Committee adds that the requirement

> reinforces the principal responsibility of States parties to ensure the direct provision of the right to education in most circumstances.

The latter comment correctly suggests that private investment in education cannot replace investment in education by the state. It has aptly been held that "[o]nly the State . . . can pull together all the components into a coherent but flexible education system".[281]

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[278] See 10.4.4.2. *supra.*
[279] See Gebert, 1996, p. 487.
[280] See note 2.
[281] UNICEF, 2000, p. 77.

The duty concerning the development of a system of schools is progressive in nature. This is implied by the use of the term "development", and also follows from article 2(1), with which article 13(2)(e) must be read. With regard to less developed states parties, the emphasis in developing a system of schools must be on establishing such a system in the first place. With regard to developed states parties, it must be on improving the quality of the system of schools already in place.[282]

4.6.2. *Establishing an Adequate Fellowship System*

Article 13(2)(e) does not define the term "fellowship". The term must thus be defined by reference to its meaning in national education systems. These define "fellowship" as financial assistance granted to individual students intended to help cover the direct and indirect costs of education. The financial assistance may take various forms, notably, study bursaries (which may be wholly or partially refundable, or non-refundable) and low-interest loans. The mentioned financial assistance is usually granted in the case of need with regard to studies at the post-compulsory level, *i.e.* at the upper secondary and higher levels.

The obligation to establish an adequate fellowship system is directed at enhancing *the accessibility* of education, more specifically, the economic accessibility of education. The rationale underlying the obligation is that nobody should be denied access to education because he or his parents cannot afford it. It may thus be stated that the requirement to establish an adequate fellowship system targets "static" discrimination against vulnerable groups in society concerning access to education. In paragraph 26 General Comment No. 13,[283] the CESCR hence states that the requirement

> should be read with the Covenant's non-discrimination and equality provisions; the fellowship system should enhance equality of educational access for individuals from disadvantaged groups.

Similarly, in paragraph 53, the Committee states that

> [u]nder article 13(2)(e), States parties are obliged to ensure that an educational fellowship system is in place to assist disadvantaged groups.

It may be asked what the relationship between the requirements of (progressively) free education and a fellowship system is. As primary education must be "available free to all", a fellowship system, providing, as it does, financial assistance in case of need only, has no place in the context of

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[282] See Gebert, 1996, p. 488.
[283] See note 2.

primary education. Access to secondary and higher education, however, need not be free to all, but must only be promoted "by every appropriate means, and in particular by the progressive introduction of free education". The progressive introduction of free education is prescribed. Nevertheless, other means must also be utilised. By virtue of article 13(2)(e), the establishment of an adequate fellowship system constitutes an "appropriate means". The requirements of (progressively) free education and a fellowship system are complementary: As long as secondary and higher education are not free, the existence of a fellowship system is important. Its importance diminishes as free education is being realised.[284]

The duty concerning the establishment of an adequate fellowship system is progressive in nature. This follows from article 2(1). The duty is directed at the legislative and administrative organs of government, but may confer justiciable claims where a fellowship system has already been established.

4.6.3. *Continuously Improving the Material Conditions of Teaching Staff*

The obligation to continuously improve the material conditions of teaching staff seeks to protect the labour, salary and social security rights of teachers. But, seeing that these are already guaranteed by articles 6 to 9 ICESCR,[285] the said obligation must be held to serve an additional purpose. The obligation has been included in article 13(2)(e) to emphasise the relationship between improving the material conditions of teaching staff and enhancing the quality of the education system as a whole. If teaching staff enjoy favourable material conditions, this will impact beneficially on the quality of the education system, because it will put schools in a position to recruit qualified teachers, committed to the teaching profession. This has also been recognised by the CESCR in General Comment No. 13. The Committee points out that the unacceptably low levels of general working conditions of teachers in many states parties are not only inconsistent with article 13(2)(e), but are "also a major obstacle to the full realisation of students' right to education".[286] After all, fulfilment of the right to education presupposes quality teaching by qualified teachers.

The requirement to continuously improve the material conditions of teaching staff may be said to entail three claims:

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[284] See Gebert, 1996, p. 489.

[285] Art. 6 ICESCR protects the right to work, art. 7 the right to fair conditions of employment, art. 8 the right to form and join trade unions and the right to strike and art. 9 the right to social security.

[286] General Comment No. 13, see note 2, para. 27.

1. The labour and trade union rights of teachers must be guaranteed.
2. Teachers must earn an acceptable salary.
3. Teachers must be protected by social security measures.

Content has been given to these claims by the following two legal instruments: the UNESCO/ILO Recommendation concerning the Status of Teachers of 1966 and the UNESCO Recommendation concerning the Status of Higher-Education Teaching Personnel of 1997.[287] Some of the relevant provisions of the two Recommendations should be briefly referred to.[288] It should be noted that the Recommendations apply to public as well as private education.[289] In what follows, unless the context indicates otherwise, "teachers" also means "higher-education teaching personnel" and "teachers' organisations" also "organisations of higher-education teaching personnel".

The labour and trade union rights of teachers must be guaranteed

The obligation to continuously improve the material conditions of teachers means that, as a first step, certain labour and trade union rights of teachers need to be guaranteed, as favourable salaries and working conditions for teachers can only be achieved if teachers have a sufficiently strong position in negotiations on salaries and working conditions. The UNESCO/ILO Recommendation of 1966 and the UNESCO Recommendation of 1997 recognise the following rights in this regard:

- Salaries and working conditions of teachers should be determined through negotiations between teachers' organisations and the employers of teachers. Appropriate machinery should be established by statute or by agreement to assure this right.[290]
- If the process for negotiations established by such machinery is exhausted or if there is a breakdown in negotiations, teachers' organisations should have the right "to take such other steps as are normally open to other organisations in the defence of their legitimate interests".[291]

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[287] For a discussion of the Recommendation concerning the Status of Teachers of 1966 and the Recommendation concerning the Status of Higher-Education Teaching Personnel of 1997, see 6.2.2.3. *supra*.

[288] In para. 27 General Comment No. 13, see note 2, the CESCR draws the attention of states parties to the two Recommendations.

[289] Sect. 2 Recommendation concerning the Status of Teachers and sect. 2 Recommendation concerning the Status of Higher-Education Teaching Personnel.

[290] Sects. 82 and 83 Recommendation concerning the Status of Teachers and sects. 53 and 54 Recommendation concerning the Status of Higher-Education Teaching Personnel.

[291] Sect. 84 Recommendation concerning the Status of Teachers and sect. 55 Recommendation concerning the Status of Higher-Education Teaching Personnel. What is now the Joint ILO/UNESCO Committee of Experts on the Application of the Recommendations concerning Teaching Personnel (CEART) (see 6.2.2.3. *supra*) has repeatedly held that teach-

- Teachers should have access to a fair grievance procedure for the settlement of disputes with their employers arising out of terms of employment.[292]

Teachers must earn an acceptable salary

The obligation to continuously improve the material conditions of teachers also means that states parties must take measures to ensure that teachers enjoy a salary "commensurate with their role".[293] In section 114, the Recommendation concerning the Status of Teachers states that amongst the various factors which affect the status of teachers, particular importance should be attached to salary, seeing that the status of teachers is largely dependent on the economic position in which they are placed. The UNESCO/ILO Recommendation of 1966 and the UNESCO Recommendation of 1997 make, amongst others, the following suggestions concerning teachers' salaries:

- The salaries of teachers should "compare favourably with"[294]/"be at least comparable to"[295] salaries paid in other occupations requiring similar or equivalent qualifications.
- Teachers' salaries should take account of the fact that certain posts require higher qualifications and experience and carry greater responsibilities.[296]
- Teachers' salaries should be reviewed periodically to take into account such factors as a rise in the cost of living.[297]
- Salary differentials should be based on objective criteria.[298]
- During a probationary period or if employed on a temporary basis, qualified teachers should not be paid on a lower scale than that laid down for established teachers.[299]

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ers have a right to strike. See, for example, Doc. CEART/V/1988/5, para. 64. It has been stated at 6.3.1. *supra* that teachers must be considered to have a right to strike, as they do not fall within the definition of essential services or public servants acting on behalf of the public authorities.

[292] Sect. 84 Recommendation concerning the Status of Teachers and sect. 56 Recommendation concerning the Status of Higher-Education Teaching Personnel.

[293] General Comment No. 13, see note 2, para. 27.

[294] Sect. 115(b) Recommendation concerning the Status of Teachers.

[295] Sect. 58(b) Recommendation concerning the Status of Higher-Education Teaching Personnel.

[296] Sect. 115(d) Recommendation concerning the Status of Teachers and sect. 58(d) Recommendation concerning the Status of Higher-Education Teaching Personnel.

[297] Sect. 123(1) Recommendation concerning the Status of Teachers and sect. 58(f) Recommendation concerning the Status of Higher-Education Teaching Personnel.

[298] Sect. 119 Recommendation concerning the Status of Teachers and sect. 59 Recommendation concerning the Status of Higher-Education Teaching Personnel. Sect. 119 mentions as examples of objective criteria levels of qualification, years of experience and degrees of responsibility, and further emphasises that the relationship between the lowest and the highest salary should be of a reasonable order.

[299] Sect. 116 Recommendation concerning the Status of Teachers and sect. 60 Recommendation concerning the Status of Higher-Education Teaching Personnel.

- Merit-rating systems for purposes of salary determination may be applied, but only with the prior consultation with and acceptance by teachers' organisations[300]/the prior consultation with organisations of higher-education teaching personnel.[301]
- Teachers who are required to teach beyond their regular workload should receive additional remuneration.[302]
- The Recommendation concerning the Status of Teachers also provides that "[a]dvancement within the grade through salary increments granted at regular, preferably annual, intervals should be provided".[303]

Teachers must be protected by social security measures

The obligation to continuously improve the material conditions of teachers further means that states parties must ensure that teachers are protected by social security measures. These measures should include medical care in case of sickness or injury, benefits in case of sickness as well as employment injuries and occupational diseases, and old-age, invalidity and survivors' benefits. Both the UNESCO/ILO Recommendation of 1966 and the UNESCO Recommendation of 1997 contain suggestions in this regard. Sections 125 to 140 Recommendation concerning the Status of Teachers and sections 63 and 64 Recommendation concerning the Status of Higher-Education Teaching Personnel deal with social security measures for teachers.

It should finally be pointed out that the duty concerning the continuous improvement of the material conditions of teaching staff is progressive in nature. This follows from article 2(1). The duty is directed at the legislative and administrative organs of government, but entails justiciable claims to the extent that existing legislation defines individual rights of teachers concerning their material conditions.

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[300] Sect. 124 Recommendation concerning the Status of Teachers.

[301] Sect. 61 Recommendation concerning the Status of Higher-Education Teaching Personnel.

[302] Sect. 118 Recommendation concerning the Status of Teachers and sect. 62 Recommendation concerning the Status of Higher-Education Teaching Personnel.

[303] Sect. 122(1) Recommendation concerning the Status of Teachers. Sect. 122(2) provides that "[t]he progression from the minimum to the maximum of the basic salary scale should not extend over a period longer than ten to fifteen years".

5. *Article 13(3) and (4) ICESCR: The Freedom Aspect of the Right to Education*

Article 13(3) and (4) ICESCR protect the freedom aspect of the right to education. It has been stated that the freedom aspect entails three aspects:[304]

1. protection against any tendency on the part of the state to consider that its obligation of implementing the right to education involves the introduction or preservation of a state monopoly in education;
2. the right of individuals and bodies to establish and direct educational establishments; and
3. protection against a noticeable trend "towards the 'deprofessionalisation' of teachers and teaching, with the teacher's role reduced to that of a technician primarily responsible for implementing prescribed procedures, rather than for making a professional judgement about the instructional approach that would be most appropriate and effective in the particular situation".[305]

Article 13(3) protects the right of parents to choose for their children private schools and to ensure the religious and moral education of their children in conformity with their own convictions. Article 13(4) protects the right of individuals and bodies to establish and direct educational institutions. These two provisions cover at any rate points 1 and 2 of the freedom aspect of the right to education, mentioned above. Article 13(3) and (4) will now be analysed.

5.1. *Article 13(3) ICESCR: Parental Rights or the Freedom to Choose*

Article 13(3) ICESCR[306] states:

> The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

Article 13(3) may be said to protect *the freedom to choose*. It does so in two respects. It protects:

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[304] See Mehedi, 1999b, para. 73 (UN Doc. E/CN.4/Sub.2/1999/10).

[305] UNESCO (ed.), *World Education Report 1998: Teachers and Teaching in a Changing World*, Paris: UNESCO, 1998, p. 65.

[306] On art. 13(3) ICESCR, see Gebert, 1996, pp. 555–572.

1. the freedom of parents to choose for their children private schools; and
2. the freedom of parents to ensure the religious and moral education of their children in conformity with their own convictions.

Each of these aspects will be examined in the following discussion.

5.1.1. *The Right of Parents and, When Applicable, Legal Guardians*

By virtue of the closeness of the parent/child relationship, the right to determine the child's education belongs to his parents.[307] However, if the closeness of the relationship does not exist anymore, the right is lost. The European Commission of Human Rights, as it then was, has thus held that the right is an incident of custody.[308] In case of adoption or when the courts have removed the right to custody, parents loose the right to determine the child's education. The Commission has, however, further held that a care order does not remove parents' right to custody. Although such an order entails a temporary transfer of certain parental rights to the public authorities, parents retain custody and hence also the right to determine the child's education. This right would, however, have to be reduced in accordance with the transfer of care.[309] It appears meaningful to interpret article 13(3) in line with the European Commission's case law. "Legal guardians" refers to all those persons who legally (usually under a court order) exercise custody with regard to a child in lieu of the child's parents.[310] Article 13(3) does not indicate whether legal guardians are obliged to determine the child's education in consonance with the parents' presumed will. It has been suggested, and this seems correct, that it is not the legal guardian's function to substitute his own views on education for those of the child's parents, but rather to assure the continuity of the child's education and to respect parental values in this regard.[311]

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[307] It is submitted that adoptive parents are in the same position as the child's natural parents, and may thus freely determine their child's education. See also Palm-Risse, 1990, p. 370.

[308] Commission, Application No. 7911/77, *X v. Sweden*, DR 12 (1978), p. 192.

[309] *Olsson v. Sweden*, Report of the Commission of 2 December 1986, Publications of the European Court of Human Rights, Series A, Vol. 130, paras. 180–187.

[310] See Gebert, 1996, pp. 561–562 and the references there to the *travaux préparatoires* of the ICESCR.

[311] See Palm-Risse, 1990, p. 369. It should also be realised that the relationship between legal guardian and child is not as close as that between parent and child. See Palm-Risse, 1990, p. 369.

5.1.2. *The Right of Parents to Choose for Their Children Private Schools*

As has been stated, the freedom aspect of the right to education includes the claim that the state should not exercise a monopoly in education. For this reason, article 13(3) protects the right of parents to choose for their children private schools, in which they can receive an education which differs substantially from that provided in state schools as regards content and methods. The right is closely related to the right to establish private schools, protected in article 13(4). The right to choose a private school presupposes the existence of the right to establish private schools. Conversely, the right to establish private schools is meaningless unless there also exists the right to choose a private school.[312] The right of parents to choose for their children private schools is subject to the condition that private schools must conform to those minimum educational standards laid down or approved by the state.[313] This condition has been repeated in article 13(4) and will be discussed when commenting on article 13(4).[314]

It may be asked whether article 13(3) also protects the right to *home schooling*. Article 13(3) refers to the right of parents to choose for their children non-public "schools" and would, therefore, appear not to protect the right to home schooling. This does not mean, however, that states parties may not recognise such a right in their national legal orders.[315] It should be noted that the former European Commission of Human Rights seems to have interpreted article 2 P-1 ECHR, which, likewise, is silent on the issue, to protect the right to home schooling.[316] The Commission emphasised, however, and this aspect is relevant as regards article 13(3), that home schooling should be subject to verification and enforcement of educational standards. The Commission attached weight to the responsibility of parents "to co-operate in the assessment of their children's educational standards by an education authority in order to ensure a certain level of literacy and numeracy".[317] This approach must be supported in view of the dangers necessarily involved where children are educated at home, namely, that parents may abuse their parental powers, or that children

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[312] Para. 29 General Comment No. 13, see note 2, thus states that the right to choose a private school "has to be read with the complementary provision, article 13(4)".

[313] See *idem*, which remarks that "[t]hese minimum standards may relate to issues such as admission, curricula and the recognition of certificates".

[314] See 10.5.2.1. *infra*.

[315] See Gebert, 1996, pp. 560–561.

[316] Commission, Application No. 10233/83, *Family H v. United Kingdom*, DR 37 (1984), p. 105.

[317] *Ibidem* at p. 106. See the comments on this case by Van Bueren, 1995, p. 245 and Van Dijk and Van Hoof, 1998, p. 646.

may not be in a position to fully develop their personality or that they may not be properly socialised.[318]

5.1.3. *The Right of Parents to Ensure the Religious and Moral Education of Their Children in Conformity with Their Own Convictions*

Article 13(3) further protects the right of parents to ensure the religious and moral education of their children in conformity with their own convictions. Also this right is intended to afford protection against excessive state influence in education.

5.1.3.1. *The right of parents as part of the right to freedom of thought, conscience and religion*

The right of parents to ensure the religious and moral education of their children in conformity with their own convictions should be considered to form part of their right to freedom of thought, conscience and religion. This view finds support in the fact that article 18 ICCPR on the latter right, like article 13(3) ICESCR, in paragraph (4), protects "the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions".

5.1.3.2. *Respect for parental convictions in the public education system*

In view of the fact that article 13(3), in addition to the right of parents to ensure the religious and moral education of their children in conformity with their convictions, protects their right to choose for their children private schools, the former must cover more than respect for parental convictions by allowing parents to send their children to private schools. It must also entail respect for parental convictions in the public education system. That this is the proper interpretation of this right may be shown by referring to the case law of the European Court of Human Rights on article 2 P-1 ECHR, which, like article 13(3) ICESCR, directs states parties to respect the right of parents to ensure the education of their children in conformity with their religious and philosophical convictions. In the case of *Kjeldsen, Busk Madsen and Pedersen v. Denmark*,[319] parents had com-

[318] Note may also be taken of the case of *R v. Jones* (1986) 2 S.C.R. 284, decided by the Canadian Supreme Court. Canadian law allows children to be exempted from attending school if they receive efficient instruction at home as certified by an official. The defendant *in casu* had refused to apply for an approval of home schooling, as he considered this to violate his freedom of religion. The Court held, however, that "accommodation of defendant's religious beliefs would entail a complete exemption from state regulation" and thus "severely impede the achievement of important state goals".

[319] *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, Judgement of 7 December 1976, Publications

plained that compulsory sex education in public schools violated the above right. The Danish government argued that by allowing parents to send their children to private schools to which the state paid substantial subsidies, Denmark discharged its duties under article 2, *i.e.* that it did not have to respect parents' religious and philosophical convictions in state schools. The Court disagreed, however. It stated:

> The second sentence of Article 2 . . . aims in short at safeguarding the possibility of pluralism in education which possibility is essential for the preservation of the "democratic society" as conceived by the Convention. In view of the power of the modern State, it is above all through State teaching that this aim must be realised.[320]

The Court added, however:

> In its investigation as to whether Article 2 . . . has been violated, the Court cannot forget . . . that the functions assumed by Denmark in relation to education and to teaching include the grant of substantial assistance to private schools.[321]

The same reasoning should be applicable with regard to article 13(3) ICESCR. Pluralism in education can only be realised in the modern state if parental convictions are also respected in the context of the public education system. The fact that the state subsidises private schools, and in this way facilitates access to these schools, in itself does not suffice for it to comply with its duties, but may mean that its efforts to respect parental convictions in public education need not be as far-reaching.

The question is how states parties should respect the right of parents to ensure the religious and moral education of their children in conformity with their own convictions in the public education system. This question will be addressed in the next two sections, the first discussing parents' religious, the second parents' moral convictions.

5.1.3.3. *Respecting parents' religious convictions in public education*[322]

"Religious convictions" should be held to mean all convictions based on the belief in a higher force, whatever its nature, and whether or not that

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of the European Court of Human Rights, Series A, Vol. 23. This case will be discussed more fully at 10.5.1.3.4.1. *infra.*

[320] *Ibidem* at para. 50.

[321] *Idem.*

[322] The right of parents to ensure the religious education of their children in conformity with their own convictions (art. 13(3)) is taken to mean the right of parents to ensure their children's education in conformity with their own religious convictions. For a discussion of the various aspects of respect for parents' religious convictions in the context of art. 2 P-1 ECHR, which discussion is also relevant to art. 13(3) ICESCR, see Wildhaber, 1986/2000, pp. 22–28, paras. 79–100.

belief entails a formalised way of worship. "Religious convictions" also include atheistic convictions.[323]

5.1.3.3.1. *Denominational schools*

International law does not require the separation of church and state. This is pointed out by the Human Rights Committee in its General Comment No. 22 on article 18 ICCPR, protecting the right to freedom of religion.[324] To varying degrees, however, many states do provide for a separation of church and state, as it is otherwise difficult to secure compliance with the prohibition of discrimination, the right to freedom of religion and minority rights. In General Comment No. 22, the HRC observes:

> The fact that a religion is recognised as a state religion or that it is established as official or traditional or that its followers comprise the majority of the population, shall not result in any impairment of the enjoyment of any of the rights under the Covenant, including articles 18 and 27, nor in any discrimination against adherents to other religions or non-believers.[325]

From what has been stated, the conclusion may be drawn that denominational schools are not forbidden by international law. The reference here is to state schools, in which all teaching is based on and informed by a specific religious dogma.[326] To ensure respect for parents' religious convictions, however, as required by article 18(4) ICCPR and article 13(3) ICESCR, states parties must guard that parents, who are adherents of a different religion or atheists, are not legally or factually obliged to send their children to a denominational school in conflict with their religious convictions. At a minimum, states parties would have to assure that there are state schools available which provide religiously neutral education for the children of such parents. States parties must also guard that resources are equitably shared between denominational and other schools.[327]

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[323] This wide definition of "religious convictions" is proposed by Palm-Risse, 1990, pp. 389–390 with regard to art. 18(4) ICCPR, but should also be adopted in the context of art. 13(3) ICESCR.

[324] HRC, General Comment No. 22 (Forty-Eighth Session, 1993) Article 18 ICCPR [*Compilation*, 2004, pp. 155–158], para. 9.

[325] *Idem.*

[326] See, however, Gebert, 1996, p. 603, who doubts that denominational schools are compatible with art. 13(3) ICESCR.

[327] Essentially the same line of reasoning applies with regard to schools based on a religious ethos, *i.e.* schools other than denominational schools, in which teaching is broadly orientated towards the values of a certain religion, although, in this instance, the risk of a violation of art. 13(3) is not as high.

5.1.3.3.2. *Prohibiting all forms of religious instruction; instruction in a particular religion; or instruction in the general history of religions and ethics*

In view of the comments made above concerning states' freedom to regulate the relationship between church and state, states parties to the ICESCR may adopt any of the following three arrangements regarding religious instruction in state schools.

Firstly, states parties may prohibit all forms of religious instruction in state schools and provide that religious education, protected under article 13(3), is to take place either outside school hours or in private schools.[328]

Secondly, states parties may provide that state schools are to offer religious education in the official or majority religion.[329] The CESCR, in General Comment No. 13, emphasises, however, that "public education that includes instruction in a particular religion or belief is inconsistent with article 13(3) unless provision is made for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents and guardians".[330] The teaching of religion should further be undertaken "in an open and enquiring way, permitting question, response and free choice by the pupil", and it should "put emphasis on comparative experiences".[331]

Thirdly, states parties may provide for instruction in the general history of religions and ethics in state schools. The CESCR, in General Comment

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[328] Note should, however, be taken of the Study, entitled "The role of religious education in the pursuit of tolerance and non-discrimination", prepared under the guidance of Abdelfattah Amor, former Special Rapporteur of the Commission on Human Rights on Freedom of Religion or Belief, and presented in 2001 in the form of "Comments to replies received from Governments", in which the author poses the question whether the exclusion of education in the field of religion is not likely to create "a legacy of ignorance". The author maintains that religious education may be used to promote values of tolerance and non-discrimination and thus to contribute to the creation of a conducive environment for the promotion and protection of human rights. See at points II.3. and III. of the Comments.

[329] States parties may also provide that state schools are to offer instruction in several or even all religions, on the basis of demand.

[330] General Comment No. 13, see note 2, para. 28. Para. 6 of the HRC's General Comment No. 22 on art. 18 ICCPR, see note 324, similarly provides that "public education that includes instruction in a particular religion or belief is inconsistent with article 18(4) unless provision is made for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents and guardians". A legitimate alternative is to require students to receive instruction in the general history of religions and ethics. Note may be taken of the case of *Karnell and Hardt v. Sweden* before the former European Commission of Human Rights (Application No. 4733/71, *Yearbook of the European Convention on Human Rights*, Vol. 14, 1971, pp. 664–692). *In casu*, the applicants, members of a minority church in Sweden, had appealed to the Commission on the basis of art. 2 P-1 ECHR, as their request to have their children exempted from instruction in the state religion in school in Sweden had been denied. The Commission declared their application admissible. The applicants later withdrew the case, however, after the Swedish authorities had decided to give satisfaction with regard to their complaint. See the comments on this case by Jacobs and White, 1996, pp. 264–265.

[331] See at point III. of the Comments mentioned in note 328.

No. 13, states that "[it] is of the view that article 13(3) permits public school instruction in subjects such as the general history of religions and ethics if it is given in an unbiased and objective way, respectful of the freedoms of opinion, conscience and expression".[332] This reflects a decision taken by the HRC in 1981 in the case of *Erkki Hartikainen v. Finland*.[333] The author of the communication had claimed that the Finnish School System Act was in violation of article 18(4) ICCPR inasmuch as it stipulated obligatory attendance in Finnish schools, by children whose parents were atheists, in classes on the history of religion and ethics. He had alleged that since the textbooks on the basis of which the classes were taught were written by Christians, the teaching had unavoidably been religious in nature. The HRC stated, however:

> The Committee does not consider that the requirement of the relevant provisions of Finnish legislation that instruction in the study of the history of religions and ethics should be given instead of religious instruction to students in schools whose parents or legal guardians object to religious instruction is in itself incompatible with article 18(4), if such alternative course of instruction is given in a neutral and objective way and respects the convictions of parents and guardians who do not believe in any religion.[334]

The author's claim did not succeed, as the Committee believed that appropriate action was being taken to resolve the difficulties concerning aspects of the teaching plan which were religious in character.[335]

5.1.3.3.3. *School prayer outside of religious class and crucifixes and other religious symbols in classrooms*

If states are free to regulate the relationship between church and state, they must also have considerable leeway with regard to their approach to school prayer outside of religious class and crucifixes and other religious symbols in classrooms, in otherwise secular state schools.

They may adopt a rather strict approach which forbids all religious references in state schools, and, in this way, prevent that some or other parents' religious convictions are being violated. This is the approach followed in the USA. In *Engel v. Vitale*,[336] the US Supreme Court held that a com-

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[332] General Comment No. 13, see note 2, para. 28. Para. 6 of the HRC's General Comment No. 22 on art. 18 ICCPR, see note 324, similarly provides that "[the HRC] is of the view that article 18(4) permits public school instruction in subjects such as the general history of religions and ethics if it is given in a neutral and objective way".

[333] *Erkki Hartikainen v. Finland*, HRC, Communication No. 40/1978, 09/04/1981, UN Doc. CCPR/C/12/D/40/1978.

[334] *Ibidem* at 10.4.

[335] *Ibidem* at 10.5.

[336] 370 U.S. 421 (1962).

pulsory prayer, composed by the state, to be said at the beginning of each school day, violated the separation of church and state.[337] In *Wallace v. Jaffree*,[338] the Court declared unconstitutional an Alabama statute which permitted public school teachers to begin their classes with a moment of silence, during which willing students could engage in either silent meditation or silent prayer. In another case, *Abington School District v. Schempp*,[339] the Court held that reading from the Bible at the start of each school day was unconstitutional. Finally, in the case of *Stone v. Graham*,[340] the Court found a Kentucky statute, requiring the posting of the Ten Commandments on the wall of each public school classroom, to be in violation of the Constitution.

States may, however, also adopt a more generous approach which allows references of a religious nature to be introduced in state schools. As these may violate some or other parents' religious convictions, ways and means must be provided to respect such parents' religious convictions. This is the approach followed in Germany. In the *School Prayer Case*,[341] the Federal Constitutional Court considered school prayer outside of religious class to be constitutional, provided students could freely decide on whether or not to take part in the prayer, for example, through staying away or some other form of exemption. In the *Crucifix Case*,[342] the Court struck down a state law, requiring crucifixes in classrooms. The ruling did not prohibit crucifixes in classrooms, however, but only found that the presence of crucifixes would be impermissible when a student, parent or teacher had objected. The Court emphasised:

> In so far as the school, in harmony with the Constitution, allows room for [activating religious convictions], as with religious instruction, school prayers and other religious manifestations, these must be marked by the principle of being voluntary and allow the other-minded acceptable, non-discriminatory possibilities of avoiding them.[343]

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[337] The decision seemed to turn on the fact that the prayer had been composed by the state.

[338] 472 U.S. 38 (1985).

[339] 374 U.S. 203 (1963).

[340] 449 U.S. 39 (1980).

[341] *School Prayer Case*, German Federal Constitutional Court, Judgement of 16 October 1979, *Entscheidungen des Bundesverfassungsgerichts*, Vol. 52, p. 223.

[342] *Crucifix Case*, German Federal Constitutional Court, Judgement of 16 May 1995, *Entscheidungen des Bundesverfassungsgerichts*, Vol. 93, p. 1.

[343] *Ibidem* at p. 24. Own translation from original German text, "Soweit die Schule im Einklang mit der Verfassung . . . Raum [zur Betätigung von Glaubensüberzeugungen] läßt wie beim Religionsunterricht, beim Schulgebet und anderen religiösen Veranstaltungen, müssen diese vom Prinzip der Freiwilligkeit geprägt sein und Andersdenkenden zumutbare, nicht diskriminierende Ausweichmöglichkeiten lassen".

The Court's judgement is being obeyed by taking down the crucifix whenever a student, parent or teacher objects to its presence.

It is suggested that although both the approaches mentioned are compatible with article 13(3) ICESCR, the latter is preferable. Both approaches duly respect parents' religious convictions, but the latter is less hostile to the positive exercise of freedom of religion in the public sphere.

5.1.3.3.4. *Imparting through compulsory teaching information of a religious nature*
In the case of *Kjeldsen, Busk Madsen and Pedersen v. Denmark*,[344] the European Court of Human Rights has held that the duty of states to respect parental convictions does not prevent them from imparting in state schools through teaching information of a directly or indirectly religious kind, in this case sex education. Parents are also not allowed to object to the integration of such teaching in the school curriculum. The Court underlined, however, that such information would have to be conveyed objectively and without the aim of indoctrination.[345] This is also valid with regard to article 13(3) ICESCR.[346]

5.1.3.3.5. *National celebrations or commemorations in which schools take part*
It may be asked whether article 13(3) also requires parents' religious convictions to be respected in state schools with regard to school activities other than actual teaching. It is instructive in this context to refer to the cases of *Valsamis v. Greece*[347] and *Efstratiou v. Greece*,[348] decided by the European Court of Human Rights in 1996. In both cases, parents, who were Jehovah's Witnesses and thus pacifists, complained that their daughter had been required to take part in a school parade on the National Day to commemorate the outbreak of war between Greece and fascist Italy in 1940, held on the same day as military parades. Having refused to attend, the girls were punished with one day's/three days' suspension from school. The parents argued that the state's conduct had violated article 2 P-1 ECHR. The Court referred to its earlier case law and stressed that the state's duty to respect parents' religious convictions "is broad in its extent as it applies

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[344] *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, Judgement of 7 December 1976, Publications of the European Court of Human Rights, Series A, Vol. 23.

[345] *Ibidem* at para. 53.

[346] The matter is addressed more fully when discussing respect for parents' moral convictions in public education at 10.5.1.3.4.1. *infra.*

[347] *Valsamis v. Greece*, Judgement of 18 December 1996, European Court of Human Rights, Reports of Judgements and Decisions 1996–VI. See the comments on this case by Bradley, 1999, p. 402.

[348] *Efstratiou v. Greece*, Judgement of 18 December 1996, European Court of Human Rights, Reports of Judgements and Decisions 1996–VI.

not only to the content of education and the manner of its provision but also to the performance of all the [functions] assumed by the State",[349] and hence also to the school parades in the present cases. The Court then proceeded to examine whether the state had failed to discharge its duty to respect the parents' religious convictions. It stated that it could discern nothing, either in the purpose of the parade or in the arrangements for it, which could offend the parents' pacifist convictions to the extent prohibited by article 2. It also noted that the parents were not deprived of their right to guide their daughter on a path in line with their religious convictions.[350]

The Court's opinion that the religious convictions of parents must also be respected with regard to school activities other than actual teaching, such as national celebrations or commemorations in which schools take part, should also be supported concerning article 13(3) ICESCR.

5.1.3.3.6. *The observance of religious holidays*

Respect for parents' religious convictions in state schools under article 13(3) ICESCR must not jeopardise the generally orderly and efficient running of schools and it must also not injure the religious feelings of other students. This will usually not be the case where exemptions are granted to students as regards certain important religious holidays celebrated by belief minorities. In these cases, schools may demand, however, that students catch up by themselves what they missed in class.[351]

5.1.3.3.7. *Displaying religious symbols in schools*

The topic of the displaying of religious symbols (such as headscarves, skull caps and crosses) in state schools, on the one hand by students, on the other by teachers, in the context of parents' right to respect for their religious convictions in state schools should, finally, be addressed.

Concerning the displaying of such symbols by *students*, the question is whether respect for parents' religious convictions in state schools under article 13(3) also covers the right that children may display religious symbols in schools. The question has been—and still is—controversially debated in many countries. Notably, the French debate concerning the wearing of

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[349] *Valsamis v. Greece*, see note 347, para. 27 and *Efstratiou v. Greece*, see note 348, para. 28.

[350] *Valsamis v. Greece*, see note 347, para. 31 and *Efstratiou v. Greece*, see note 348, para. 32. Judges Thór Vilhjálmsson and Jambrek, in a joint dissenting opinion, argued that the parents' perception of the symbolism of the school parade and its religious connotations had to be accepted by the Court, unless it was obviously unfounded and unreasonable, which they considered not to be the case. In other words, whereas the majority of the Court had examined the question whether the school parade had military overtones by reference to objective criteria, the minority adopted a subjective approach.

[351] See Wildhaber, 1986/2000, pp. 23–24, paras. 83–84 in the context of art. 2 P-1 ECHR.

Islamic headscarves in schools may be referred to here. In 1992, in *Kherouaa et autres*,[352] the French Council of State upheld the complaints relating to three female students who were excluded from school after they had refused to take off their Islamic headscarves. The Council commented as follows in this case:

> [I]n educational institutions, the displaying by learners of symbols by which they understand to manifest their membership of a religion is not by itself incompatible with the principle of laicism, as long as it constitutes an exercise of freedom of expression and of manifesting religious beliefs; but that this freedom does not permit learners to display symbols of religious membership which, by their nature, by the circumstances in which they are displayed, individually or collectively, or by their ostentatious or assertive character, constitute an act of pressure, provocation, proselytism or propaganda, attack the dignity or liberty of the learner or other members of the educational community, compromise their health or security, interfere with teaching activities and the educational role of teachers, finally disturb order in the establishment or normal functioning of the public service. . . .[353]

This statement of the Council of State should also be taken to reflect the situation regarding article 13(3) ICESCR. States parties to the ICESCR must respect the convictions of parents concerning the religious symbols they wish their children to display in schools. However, students are not allowed to display symbols which are of such a nature as would amount to an act of pressure, provocation, proselytism or propaganda, or which are objectionable in other respects noted by the Council. Even so, it needs to be appreciated that this right of parents may be subjected to restrictions. It will be shown below that the right of parents to ensure the religious and moral education of their children cannot be restricted.[354] The displaying of religious symbols is related to the freedom *to manifest* one's religion (as opposed to the freedom *to have* a religion), however, and it is generally accepted that this may be restricted. Article 18(3) ICCPR states

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[352] *Kherouaa et autres*, French Council of State, Judgement of 2 November 1992.

[353] Own translation from original French text, quoted by Wildhaber, 1986/2000, p. 28, para. 100, "[D]ans les établissements scolaires, le port par les élèves de signes par lesquels ils entendent manifester leur appartenance à une religion n'est pas par lui-même incompatible avec le principe de laïcité, dans la mesure où il constitue l'exercice de la liberté d'expression et de manifestation de croyances religieuses, mais que cette liberté ne saurait permettre aux élèves d'arborer des signes d'appartenance religieuse qui, par leur nature, par les conditions dans lesquelles ils seraient portés individuellement ou collectivement, ou par leur caractère ostentatoire ou revendicatif, constitueraient un acte de pression, de provocation, de prosélytisme ou de propagande, porteraient atteinte à la dignité ou à la liberté de l'élève ou d'autres membres de la communauté éducative, compromettraient leur santé ou leur sécurité, perturberaient le déroulement des activités d'enseignement et le rôle éducatif des enseignants, enfin troubleraient l'ordre dans l'établissement ou le fonctionnement normal du service public . . .".

[354] See 10.5.1.3.5. *infra.*

that freedom to manifest one's religion (which is laid down in article 18(1)) "may be subject . . . to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others".[355] France thus adopted a law in 2004, which provides that, in state primary and secondary schools, the wearing of signs or dress by which pupils overtly manifest a religious affiliation is prohibited. Accordingly, female students are not allowed to wear Islamic headscarves in state schools anymore.[356]

Concerning the displaying of religious symbols by *teachers* in state schools, it may be asked whether respect for parents' religious convictions in state schools under article 13(3) in any way affects the right of teachers to display such symbols in schools. In fact, besides the right of students not to be exposed to the risk of interference with their religious beliefs in state schools and the state's duty to ensure neutrality and pluralism in education, the right of parents to respect for their religious convictions in state schools constitutes one of the factors a state must take into account when deciding whether it is necessary to restrict the right of teachers to freely manifest their religion by displaying religious symbols in state schools. This has recently been held by the German Federal Constitutional Court in a case in which the Court had to rule on the constitutionality of a headscarf ban applied to an Islamic school teacher. The Court decided that the lack of any express statutory prohibition meant that teachers were entitled to wear the Islamic headscarf.[357] It stated that "[c]hanges in society which result from increasing religious diversity may be a reason for newly regulating the legitimate scope of religious references in schools".[358] It continued:

> There are arguments for taking up increasing religious diversity in schools and to use this as a means of cultivating mutual tolerance, and thus to make a contribution in the pursuit of integration. On the other hand, the stated development also brings with it a greater potential of possible conflicts in

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[355] Similarly, art. 9(2) ECHR states that freedom to manifest one's religion (which is laid down in art. 9(1)) "shall be subject . . . to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others". The case law of the former European Commission of Human Rights and the European Court of Human Rights further grants states parties a wide margin of appreciation in assessing the existence and extent of the need for interference.

[356] This is not to say, of course, that the French law would necessarily pass the European Court of Human Rights' scrutiny under art. 9(2) if brought before it.

[357] *Headscarf Dispute Case*, German Federal Constitutional Court, Judgement of 24 September 2003, 2 BvR 1436/02.

[358] *Ibidem* at para. 64. Own translation from original German text, "Der mit zunehmender religiöser Pluralität verbundene gesellschaftliche Wandel kann Anlass zu einer Neubestimmung des zulässigen Ausmaßes religiöser Bezüge in der Schule sein".

> schools. There may, therefore, also be sound arguments for according a stricter, more conservative, meaning to the state's duty to ensure neutrality in education, and, accordingly, also for principally keeping from students religious references conveyed by the external appearance of a teacher in order to avoid conflicts with students, parents or other teachers right from the instance.[359]

According to the Court, it was basically the responsibility of the legislator to resolve the inevitable conflict between the right of teachers to freely manifest their religion, on the one hand, and the state's duty to ensure neutrality and pluralism in education,[360] the right of students not to be exposed to the risk of interference with their religious beliefs and the right of parents to respect for their religious convictions, on the other.[361] This meant that a ban on the wearing of Islamic headscarves by teachers in state schools could—as an element of a decision by the legislator on the relationship between state and religion in the education system—constitute a legitimate restriction[362] of their right to freely manifest their religion.[363]

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[359] *Ibidem* at para. 65. Own translation from original German text, "Es ließen sich . . . Gründe dafür anführen, die zunehmende religiöse Vielfalt in der Schule aufzunehmen und als Mittel für die Einübung von gegenseitiger Toleranz zu nutzen, um so einen Beitrag in dem Bemühen um Integration zu leisten. Andererseits ist die beschriebene Entwicklung auch mit einem größeren Potenzial möglicher Konflikte in der Schule verbunden. Es mag deshalb auch gute Gründe dafür geben, der staatlichen Neutralitätspflicht im schulischen Bereich eine striktere und mehr als bisher distanzierende Bedeutung beizumessen und demgemäß auch durch das äußere Erscheinungsbild einer Lehrkraft vermittelte religiöse Bezüge von den Schülern grundsätzlich fern zu halten, um Konflikte mit Schülern, Eltern oder anderen Lehrkräften von vornherein zu vermeiden".

[360] The Court emphasised in this regard that, the fact that the state tolerated the displaying of religious symbols by teachers in state schools, which the latter did in accordance with an individual decision, could not be equated with the state's ordering that religious symbols be used in schools. See *ibidem* at para. 54.

[361] See *ibidem* at para. 47.

[362] See *ibidem* at para. 66.

[363] Note should also be taken of the case law of the former European Commission of Human Rights and the European Court of Human Rights on art. 9(1) and (2) ECHR with regard to the wearing of Islamic headscarves by school teachers and university students. In the cases of *Dahlab v. Switzerland*, European Court of Human Rights (Second Section), Application No. 42393/98, Admissibility Decision of 15 February 2001, Reports of Judgements and Decisions 2001–V, *Karaduman v. Turkey*, Commission, Application No. 16278/90, DR 74 (1993), p. 93 and *Şahin v. Turkey*, European Court of Human Rights (Fourth Section), Judgement of 29 June 2004, available on the Court's website at www.echr.coe.int, the Commission/Court found that in a democratic society the state was entitled to place restrictions on the wearing of Islamic headscarves, if this was incompatible with the pursued aim of protecting the rights of others and public order. In the *Karaduman* and *Şahin* cases, the Commission/Court upheld bans on the wearing of headscarves by university students, accepting government arguments that the stated bans were necessary to protect the right of students not to be exposed to the risk of interference with their religious beliefs and important state interests, such as secularism and gender equality. In the *Dahlab* case, the Court upheld a headscarf ban applied to a school teacher in charge of a class of small children. At p. 13, the Court stated that it could not be denied outright that "a powerful

5.1.3.4. *Respecting parents' moral convictions in public education*[364]

Next, the duty of states parties to respect parents' moral convictions in public education will be discussed. The meaning of "moral convictions" should first be clarified. Narrowly construed, "moral convictions" refer to convictions concerning how man should conduct himself in society, *i.e.* how he may and must act in a societal context. The ICESCR's *travaux préparatoires* make it clear, however, that "moral convictions" should be interpreted widely to mean "philosophical convictions". The Covenant only does not speak of "convictions concerning the philosophical education of children", because it was feared that this might be interpreted to cover extreme convictions, respect for which might undermine the state's role in ensuring that the best interests of children are promoted at all times.[365] Since "moral convictions" in effect mean "philosophical convictions", guidance on the nature and scope of states parties' duty to respect parents' moral convictions may be obtained from the case law of the former European Commission of Human Rights and the European Court of Human Rights on article 2 P-1 ECHR, which directs states parties to respect the right of parents to ensure the education of their children in conformity *inter alia* with their philosophical convictions. On the actual meaning of "philosophical convictions", the reader is referred to the discussion of article 2 P-1 ECHR in Chapter 5 above, where the meaning thereof has been explained.[366]

5.1.3.4.1. *Moral convictions and the content of the curriculum*

It has been stated above that states parties are obliged in terms of article 13(3) ICESCR to respect parents' moral convictions also in the context of the public education system.[367] States parties must respect such convictions, amongst others, with regard to the content of the curriculum in

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external symbol" such as the wearing of a headscarf might have some kind of proselytising effect on children aged between four and eight. In view of the need to protect pupils and their parents by preserving religious harmony and the tender age of the children for whom the teacher was responsible as a state representative, the Court held that the Swiss authorities had not exceeded their margin of appreciation and that the headscarf ban was a reasonable measure.

[364] The right of parents to ensure the moral education of their children in conformity with their own convictions (art. 13(3)) is taken to mean the right of parents to ensure their children's education in conformity with their own moral convictions. For a discussion of the various aspects of respect for parents' philosophical convictions in the context of art. 2 P-1 ECHR, which discussion is also relevant to art. 13(3) ICESCR, see Wildhaber, 1986/2000, pp. 28–29, paras. 101–107.

[365] See Gebert, 1996, pp. 563–565 and the references there to the *travaux préparatoires* of the ICESCR.

[366] See 5.2.1.1.4. *supra.*

[367] See 10.5.1.3.2. *supra.*

public schools. The question is how they should do so. The former European Commission of Human Rights in the *Kjeldsen* case indicated that states parties could respect parents' philosophical convictions by allowing exemptions or, where good reasons existed for making a subject, which may interfere with the parents' convictions, compulsory, by ensuring that the subject at issue was taught in a neutral way. The Commission emphasised that there was no general right of exemption from a subject where philosophical convictions were involved, as otherwise the state could not guarantee the right to education.[368]

The topic of respect for parents' religious and philosophical convictions regarding the content of the curriculum in public schools was addressed in detail in the case of *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, dealt with by the European Commission and Court of Human Rights.[369] As to the facts of this case, in 1970, Denmark had made a law which made sex education compulsory in public schools. Sex education was to start not later than in the third school year, and it was to form part of the instruction given in the general school subjects, in particular, Danish, knowledge of Christianity, biology, history and domestic relations. Three Danish married couples complained that compulsory sex education violated their right to respect for their religious and philosophical convictions.

The European Commission was split seven to seven as to whether the Danish law constituted a violation of the stated right. The President of the Commission cast a deciding vote against a finding of a violation. The Commission majority held that the primary concern when respecting parental convictions was not to protect children from information of a religious or philosophical nature, but to protect them from possible indoctrination in unacceptable beliefs.[370] They considered that sex education might entail such a danger.[371] The state would, therefore, have to respect parents' convictions by allowing exemptions or, where good reasons existed for making sex education compulsory, by ensuring that the subject was taught in

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[368] *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, Report of the Commission of 21 March 1975, see note 369, paras. 158–161. See also Wildhaber, 1986/2000, p. 22, para. 78.

[369] *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, European Commission of Human Rights, Report of 21 March 1975, Publications of the European Court of Human Rights, Series B, Vol. 21, and European Court of Human Rights, Judgement of 7 December 1976, Publications of the European Court of Human Rights, Series A, Vol. 23. For discussions of the case, see Wildhaber, 1976, pp. 493–496, Riedel, 1978, pp. 264–268, Evrigenis, 1981, pp. 638–639, Wildhaber, 1986 (4th revision service 2000), pp. 45–49, Berger, 1987, pp. 75–78, Lonbay, 1988, pp. 590–609, Coomans, 1992, pp. 179–182 and Wildhaber, 1993, pp. 544–546.

[370] *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, Report of the Commission of 21 March 1975, see note 369, para. 156.

[371] *Ibidem* at para. 157.

a neutral way.[372] The majority concluded that Denmark had had good reasons to introduce compulsory sex education[373] and was not attempting to impose on children a certain ethical or moral view of life.[374] The Commission minority held that as the sex education in question clearly involved religious and philosophical issues,[375] Denmark was bound to respect the convictions of the parents, by not making sex education compulsory, notably because parents could not un-teach their children about sexual matters.[376]

Subsequently, before the European Court, a majority of six judges followed the Commission majority. Judge Verdross, in a dissenting judgement, followed the Commission minority.

The Court stated that "[i]t is in the discharge of a natural duty towards their children . . . that parents may require the State to respect their religious and philosophical convictions". It explained, however, that this right had to be read in the light of other human rights, particularly, the freedom to receive and impart information and ideas.[377] From this it followed, in the Court's view, that "the setting and planning of the curriculum fall in principle within the competence of the Contracting States". The Court thus stated:

> [Respecting parental convictions] does not prevent States from imparting through teaching or education information or knowledge of a directly or indirectly religious or philosophical kind. It does not even permit parents to object to the integration of such teaching or education in the school curriculum, for otherwise all institutionalised teaching would run the risk of proving impracticable.[378]

The Court formulated the important proviso, however, that

> the State . . . must take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner. The State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions.[379]

The Court then turned to the facts of the case. It admitted that sex education was "indeed of a moral order", but considered that making it compulsory did not "entail overstepping the bounds of what a democratic State may regard as the public interest". The Court referred to the fact that sex

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[372] *Ibidem* at paras. 158–161.
[373] *Ibidem* at para. 163.
[374] *Ibidem* at para. 167.
[375] *Ibidem* at para. 6 and para. 8.
[376] *Ibidem* at para. 10.
[377] *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, Judgement of the Court of 7 December 1976, see note 369, para. 52.
[378] *Ibidem* at para. 53.
[379] *Idem*.

education *in casu* was aimed not so much at instilling knowledge children did not have or could not acquire by other means, but rather at giving them such knowledge more correctly, precisely, objectively and scientifically. It also mentioned that Denmark, by providing for compulsory sex education, was attempting to warn children against disturbing phenomena, for example, the excessive frequency of births out of wedlock, induced abortions and venereal diseases.[380] The Court held further that the Danish law did not amount to an attempt at indoctrination aimed at advocating a specific kind of sexual behaviour, as "[i]t does not make a point of exalting sex or inciting pupils to indulge precociously in practices that are dangerous for their stability, health or future or that many parents consider reprehensible". It also did not affect the right of parents to enlighten and advise their children.[381] The Court concluded, therefore, that compulsory sex education in public schools in Denmark did not violate the applicant parents' right to respect for their religious and philosophical convictions.

Judge Verdross, in his dissenting judgement, argued that one had to distinguish between, on the one hand, factual information on human sexuality and, on the other, information concerning sexual practices.[382] The former was neutral from the standpoint of morality, whereas the latter, at issue in this case, even if communicated to minors in an objective fashion, always affected the development of their consciences. It followed that even objective information on sexual activity, if given too early at school, could violate parents' convictions. Parents, accordingly, had a right to object.[383] In the Judge's opinion, this right could not be restricted by relying upon the freedom to receive and impart information and ideas.[384] Judge Verdross thus concluded that the applicant parents' right to respect for their religious and philosophical convictions had been violated.

It will be noted that whereas the majority of Commission and Court interpreted the right of parents restrictively by balancing it against the public and children's interest, the minority of Commission and Court viewed the right of parents as virtually absolute in nature. The former approach should be endorsed, for two important reasons.[385] Firstly, parents' right to respect for their convictions must, like all human rights, be held to be subject to inherent limitations. The right of parents is limited by the child's right to receive information important for his personal development and by the state's duty to provide such information, and, generally, by mea-

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[380] *Ibidem* at para. 54.
[381] *Idem.*
[382] *Ibidem* at p. 32.
[383] *Idem.*
[384] *Idem.*
[385] See Wildhaber, 1976, p. 495 in the context of art. 2 P-1 ECHR.

sures necessary in a democratic society in the public interest.[386] Secondly, the right of parents must not be viewed as a right which parents exercise in their own interest. It is a right which they must exercise in the best interests of the child.[387]

The conclusion to be drawn with regard to article 13(3) ICESCR is that compulsory education may relate to moral issues, provided this is necessary in the public and children's interest and provided further such education takes place in an objective, critical and pluralistic manner and does not pursue an aim of indoctrination.

5.1.3.4.2. *Moral convictions and the administration of schools*

It has been shown that in terms of article 13(3) ICESCR states parties are obliged to respect parents' moral convictions as regards the content of the curriculum in public schools. Another question is whether states parties must also respect parents' moral convictions on matters concerning the administration of public schools. This question was addressed in the case of *Campbell and Cosans v. United Kingdom*, dealt with by the European Commission and Court of Human Rights.[388] In this case, parents complained *inter alia* that the state's refusal to accept their rejection of corporal punishment as a disciplinary measure in public schools violated their right to respect for their philosophical convictions.[389]

The UK government argued that matters, such as discipline, related to the internal administration of a school. They were thus ancillary and not functions in relation to education. Accordingly, parental convictions on these matters did not have to be respected. The Court held, however, that it was "somewhat artificial to attempt to separate off matters relating to internal administration as if all such matters fell outside the scope of [the right to education]".[390] The Court stated:

> The use of corporal punishment may, in a sense, be said to belong to the internal administration of a school, but at the same time it is, when used, an integral part of the process whereby a school seeks to achieve the object

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[386] On the limits of the right of parents, see 10.5.1.3.5. *infra*.

[387] On the child's right to education versus the right of parents, see 10.5.1.3.6. *infra*.

[388] *Campbell and Cosans v. United Kingdom*, European Commission of Human Rights, Report of 16 May 1980, Publications of the European Court of Human Rights, Series B, Vol. 42, and European Court of Human Rights, Judgement of 25 February 1982, Publications of the European Court of Human Rights, Series A, Vol. 48. For discussions of the case, see Wildhaber, 1986 (4th revision service 2000), pp. 38–41, Berger, 1987, pp. 165–169, Lonbay, 1988, pp. 610–629, Coomans, 1992, pp. 182–185 and Wildhaber, 1993, pp. 541–544.

[389] For the facts of this case, see 10.4.1.3.2. *supra*, where it has been discussed in the context of the acceptability of corporal punishment in schools from a human rights perspective.

[390] *Campbell and Cosans v. United Kingdom*, Judgement of the Court of 25 February 1982, see note 388, para. 33.

> for which it was established, including the development and moulding of the character and mental powers of its pupils.[391]

The Court thus decided that states parties would often have to respect parents' convictions on matters concerning the administration of schools as well.[392] The Court's reasoning is also convincing in the context of article 13(3) ICESCR.

The UK government further argued that views on the use of corporal punishment did not amount to "philosophical convictions". The Court did not agree, however, and stated:

> The applicants' views relate to a weighty and substantial aspect of human life and behaviour, namely the integrity of the person, the propriety or otherwise of the infliction of corporal punishment and the exclusion of the distress which the risk of such punishment entails.[393]

As has been indicated in Chapter 5 above, Commission and Court have given a fairly extensive meaning to the term "philosophical convictions".[394]

The Court held that, although respect for the parents' convictions in this case would not require the UK to establish "a dual system whereby in each sector there would be separate schools for the children of parents objecting to corporal punishment", the UK could be expected to set up "a system of exemption for individual pupils in a particular school".[395]

The Court, therefore, concluded that the UK's refusal to accept the parents' rejection of corporal punishment as a disciplinary measure violated their right to respect for their philosophical convictions.

5.1.3.5. *The limits of the right of parents*

The right of parents to ensure the education of their children in conformity with their religious and moral convictions is of a rather fundamental character. The CESCR, in General Comment No. 13, thus points out that this right replicates article 18(4) ICCPR and "notes that the funda-

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[391] *Idem.*

[392] Judge Evans, in a partly dissenting judgement, held that the Court's interpretation was too wide and could give rise to considerable difficulties in practice, as it would require "very strongly held beliefs on such matters as the segregation of sexes, the streaming of pupils according to ability or the existence of independent schools, which could be claimed to have a religious or philosophical basis" to be respected. See his judgement, para. 5.

[393] *Campbell and Cosans v. United Kingdom*, Judgement of the Court of 25 February 1982, see note 388, para. 36.

[394] See 5.2.1.1.4. *supra.*

[395] *Campbell and Cosans v. United Kingdom*, Judgement of the Court of 25 February 1982, see note 388, para. 37. Judge Evans, in his dissenting judgement, rejected a system of exemption, however, arguing that discipline could not be administered fairly "if children in the same class have to be treated differently according to the views of their parents". See his judgement, para. 7.

mental character of article 18 ICCPR is reflected in the fact that this provision cannot be derogated from, even in time of public emergency, as stated in article 4(2) of that Covenant".[396] The HRC, in General Comment No. 22 on article 18 ICCPR, further emphasises that "the liberty of parents and guardians to ensure religious and moral education cannot be restricted".[397] This notwithstanding, it will have to be accepted that this right of parents, as all other human rights, is subject to certain inherent limitations.[398] Article 5(1) ICESCR, it should be noted, provides that "[n]othing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognised herein . . .". In other words, parents cannot rely upon their right to respect for their religious and moral convictions where these are racist, hostile to human rights or antidemocratic. In the case of *Campbell and Cosans v. United Kingdom*, the European Court of Human Rights thus stated with regard to article 2 P-1 ECHR that "convictions" refer only to such convictions as are worthy of respect in a democratic society, are not incompatible with human dignity and do not conflict with the fundamental right of the child to education.[399] Luzius Wildhaber, commenting on article 2 P-1 ECHR, adds that convictions deserve respect only if they do not jeopardise the orderly and efficient running of schools and if they do not excessively restrict the rights and freedoms of others.[400] This should also be held to be the case with regard to the right of parents to respect for their religious and moral convictions, as protected in article 13(3) ICESCR.[401]

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[396] General Comment No. 13, see note 2, para. 28.

[397] General Comment No. 22, see note 324, para. 8.

[398] Art. 13(3) ICESCR, it should be pointed out, uses the term "liberty". The drafters of the ICESCR apparently chose the term because it was feared that the term "right" might be interpreted to mean a right which is unrestricted. See Gebert, 1996, pp. 558–559 and the references there to the *travaux préparatoires* of the ICESCR.

[399] *Campbell and Cosans v. United Kingdom*, Judgement of 25 February 1982, Publications of the European Court of Human Rights, Series A, Vol. 48, para. 36.

[400] See Wildhaber, 1986/2000, p. 29, para. 104.

[401] Respect for parents' religious and moral convictions would also have to be balanced against important state interests, such as that "some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence" and further that "education prepares individuals to be self-reliant and self-sufficient participants in society". These interests were mentioned by the US Supreme Court in the case of *Wisconsin v. Yoder* 406 U.S. 208 (1972). In this case, however, the Court considered the state's interest in compulsory education up to the age of 16 not so compelling as to override the established religious practices of Amish parents who wished to withdraw 15 and 16-year-old children from the state system to be trained in the traditional Amish agrarian way of life.

5.1.3.6. *The child's right to education versus the right of parents*[402]

As the European Court of Human Rights stated in the *Kjeldsen* case, parents have a natural duty towards their children, in terms of which they are primarily responsible for the education and teaching of their children.[403] This natural duty of parents is recognised in article 10(1) ICESCR, under which protection is afforded to the family, particularly "while it is responsible for the care and education of dependent children". The provision confirms that parents have a right with regard to all aspects of their children's education, including their religious and moral education, both in the context of family and school life. At the same time, however, education is a human right for which the state bears responsibility. The state thus also has competences regarding the education of children. The exercise of these competences will necessarily result in certain limitations of the right of parents. However, by providing that parents have the right to ensure the religious and moral education of their children in conformity with their own convictions, article 13(3) ICESCR restricts the state's power to impose such limitations on parents' right in the sphere of religious and moral education.[404]

It needs to be realised, however, that the right to education accrues to the child itself. It is in this light that the right of parents must be understood. Parents are accorded a right with regard to their children's education, because children, on account of their immaturity, cannot exercise the right to education themselves. The right of parents is, therefore, an agency right, parents acting as the agents of their children.[405] This has two important implications.

Firstly, the right of parents must not be viewed as a right which parents exercise in their own interest. It is a right which they must exercise in the best interests of the child. The moment they fail to do so, the state must in lieu of the parents see to it that the child's best interests are promoted. The right of parents cannot be seen as "confirmation of a paternalistic conception of life".[406] Or, as Mr. Kellberg in his separate but concurring opinion in the European Commission of Human Rights' decision in the *Kjeldsen* case stated, "It is hardly conceivable that the drafters would have intended to give parents something like dictatorial powers over

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[402] On the relationship between the child's right to education and the right of parents, see Wildhaber, 1976, p. 495, Delbrück, 1992, pp. 101–103, Cullen, 1993, pp. 159–163, Van Bueren, 1995, pp. 242–244, Nowak, 1995b, pp. 204–206 and Gebert, 1996, pp. 569–570.

[403] *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, Judgement of 7 December 1976, Publications of the European Court of Human Rights, Series A, Vol. 23, para. 52.

[404] See also Gebert, 1996, pp. 562–563 in this regard.

[405] See Cullen, 1993, p. 163.

[406] Wildhaber, 1976, p. 495.

the education of their children".[407] Parents are accorded a right with regard to their children's education, because it is held that they are best in a position to protect their children's interests *vis-à-vis* the state and, in the extreme case, against totalitarian tendencies on the part of the state.[408] But, parents do not have a right to educate their children "as they please".

Secondly, as children become mature, the justification for parents acting as their children's agents falls away. It has thus been stated:

> [W]e must remember that the incapacity of childhood is not absolute. A child gradually acquires the ability, and therefore the right, to make decisions for himself or herself. . . . [T]he child who wishes to participate in school activities which the parents consider to be contrary to their religion . . . [i]f the child is old enough to make an informed decision on his or her own, that decision should be allowed to stand in most circumstances.[409]

Elsewhere it has similarly been stated:

> [The] protective right of parents can only apply as long [as] the child has not yet come of age in religious and related matters which usually takes place several years earlier than full majority in the legal sense. Thus, a fourteen or fifteen year old person normally would not be subject to parental authority in religious matters anymore, although majority in the legal sense has not yet been reached.[410]

The conclusions to be drawn with regard to article 13(3) ICESCR are, therefore, that parents, in ensuring the religious and moral education of their children, must promote the best interests of their children, and further that they loose their right to ensure such education, once their children become mature in religious and moral matters.[411]

5.1.4. *Only Negative or Also Positive Duties Under Article 13(3) ICESCR?*

Article 13(3) ICESCR forms part of the freedom aspect of the right to education. It seeks to guarantee to parents the freedom to determine the education of their children without undue state interference. First and foremost, article 13(3), therefore, gives rise to negative duties for states parties. These do not require state resources and are thus not subject to the

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[407] *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, Report of the Commission of 21 March 1975, Publications of the European Court of Human Rights, Series B, Vol. 21, p. 50, para. 2.

[408] See Gebert, 1996, p. 569.

[409] Cullen, 1993, pp. 161–162.

[410] Delbrück, 1992, p. 103. See, however, Nowak, 1995b, p. 205, who states that it is doubtful whether this opinion is supported by present international law.

[411] In view of the danger that the right of parents might be interpreted as an absolute right, the CRC formulates the respective rights of parents and children differently. See 4.5.2. *supra*.

notion of progressive realisation. On the contrary, states parties must comply with them immediately. This does not necessarily mean, however, that article 13(3) does not also have a social component, entailing positive duties to be realised progressively. There do, in fact, exist arguments which support an interpretation of article 13(3), in terms of which states parties may, in certain cases, be obliged to grant financial assistance to parents to enable them to send their children to private schools, or to create state schools which in various ways respect the religious and moral convictions of parents:

- Interpreting article 13(3) only negatively conflicts with the nature of the ICESCR as an instrument protecting ESCR.
- Seeing that article 18(4) ICCPR already protects the right of parents, the question arises whether article 13(3) was intended as a mere repetition of article 18(4) without an independent meaning.
- Article 13(3) must be read with article 2(2), which, it has been argued,[412] expects states parties to make an effort to achieve equal opportunities and equal treatment for all in the enjoyment of Covenant rights. The exercise of parental rights may be quite expensive, and possible for poorer parents only with the state's support.[413]

It has been suggested, and this should be supported, that financial assistance to enable parents to send their children to private schools is appropriate in, for example, the following cases:

- To enable poor parents to send their gifted child to a private school which attends to the specific learning needs of gifted children;
- Conversely, to enable poor parents to send their child which has learning difficulties to a private school which attends to the specific learning needs of children with learning difficulties;
- In exceptional cases, to enable poor parents who, on account of their religious or moral convictions, cannot be expected to send their child to a state school, to send the child to a private school; and
- To enable poor parents to send their disabled child to a private school, where no appropriate state school for disabled children is available.[414]

5.1.5. *The Justiciability of Article 13(3) ICESCR*

As a freedom right, article 13(3) ICESCR is justiciable. That this is the correct view is confirmed by the fact that the right of parents is also protected in article 18(4) of the ICCPR, the rights of which are accepted to

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[412] See 9.3.1. *supra.*
[413] The arguments cited are mentioned by Gebert, 1996, pp. 570–571.
[414] See *ibidem* at p. 604.

be justiciable. Article 2(3) ICCPR expects states parties to place an effective remedy at the disposal of a person whose rights under the ICCPR have been violated.[415] Where a state party to the ICESCR has also ratified the ICCPR and the First Optional Protocol to the ICCPR, the possibility exists further of bringing a case of an alleged violation of the right of parents before the Human Rights Committee. Although the communication will have to be based on article 18(4) ICCPR, this is an indirect way of bringing a claim alleging a violation of article 13(3) ICESCR before an international human rights body.[416]

5.2. *Article 13(4) ICESCR: Private Schools or the Freedom to Establish*

Article 13(4) ICESCR[417] states:

> No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

Article 13(4) may be said to protect *the freedom to establish*, *i.e.* the freedom to open a private educational establishment, which may offer an education that differs substantially from that provided by the state in its inspiration, content and methods.[418]

5.2.1. *The Right to Found Private Schools*

For purposes of article 13(4) ICESCR, private schools should be considered to mean schools which are privately managed. Thus, "government-aided schools are considered private if they are privately managed".[419] The CESCR, in General Comment No. 13, points out that the right in article 13(4) accrues to everyone, including non-nationals. The Committee further states that the right also extends to "bodies", *i.e.* legal persons.[420] The Committee goes on to state that the right "includes the right to establish

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[415] Art. 2(3) ICCPR has been fully cited in note 81 in Chapter 3.

[416] See, for example, the case of *Erkki Hartikainen v. Finland*, HRC, Communication No. 40/1978, 09/04/1981, UN Doc. CCPR/C/12/D/40/1978, discussed at 10.5.1.3.3.2. *supra*.

[417] On art. 13(4) ICESCR, see Gebert, 1996, pp. 605–613.

[418] See Wachsmann, P., *Libertés publiques*, Paris: Dalloz, 1996, at p. 429.

[419] UNESCO (ed.), *World Education Report 1998: Teachers and Teaching in a Changing World*, Paris: UNESCO, 1998, p. 118. UNESCO classifies schools by the criterion of their management.

[420] Gebert, 1996, p. 607 argues that the term "bodies" also refers to groups of persons which do not constitute legal persons in the legal sense.

and direct all types of educational institutions, including nurseries, universities and institutions for adult education".[421]

It will be noted that rather than formulating the right to found private schools in an outright manner, article 13(4) states that "[n]o part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions". The reason for the indirect formulation is that the drafters of article 13(4) feared that the right to found private schools might be interpreted as including a right to set up sectarian schools or schools based on antidemocratic or totalitarian ideas and that they opined that a weakened formulation of the right would make it clear that such a right was not covered by article 13(4).[422] Nevertheless, despite the indirect formulation of the right in article 13(4), the right to found private schools constitutes a full-fledged Covenant right.[423]

Article 13(4) protects the rights to *establish* and to *direct* private schools. Both these rights are subject to two limitations, however. Firstly, private schools must observe the aims of education set out in article 13(1). The education in private schools must thus also be directed to the full development of the human personality and enable persons to participate effectively in a free society. It must, likewise, be guided by the concept of an "international/global education".[424] Secondly, the education given in private schools must conform to such minimum standards "as may be laid down by the State". Although article 13(4) declares that states parties "may" lay down minimum standards, the Committee, in General Comment No. 13, emphasises that states parties "are obliged" to establish minimum standards to which private schools are required to conform.[425] It is further important that states parties may only provide for "minimum" standards. Private schools may not be obliged to comply with the same standards as state schools, as, in this case, they would, as it were, have to conform to "maximum" standards.[426] States parties may thus only require that private education be broadly equivalent to state education. They may assure that private education meets essential educational goals, but must leave the determination of content and methods largely to private schools themselves.[427] Other minimum standards concern teacher qualifications, and

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[421] General Comment No. 13, see note 2, para. 30.

[422] The drafters of the ICESCR apparently chose to speak of the "liberty" to found private schools rather than a "right" in this regard for the same reason.

[423] See Gebert, 1996, pp. 605–607 and the references there to the *travaux préparatoires* of the ICESCR.

[424] On the aims of education in art. 13(1) ICESCR, see 10.3. *supra*.

[425] General Comment No. 13, see note 2, para. 54.

[426] See Gebert, 1996, p. 608.

[427] See *ibidem* at pp. 647–648.

school buildings and equipment. States parties must ensure compliance with minimum standards both at the time when a private school is being established and while it is in operation.[428] With regard to the establishment, states parties would usually have to operate some system of accreditation and/or licensing.[429] Compliance while the private school is in operation can be ensured, for example, by requiring private schools to provide information whenever called upon to do so or in periodic reports, by examining students to ascertain their educational level, by state representation on the supervisory bodies of private schools, by inspections of classrooms or, finally, by visits of lessons.

5.2.2. *Only Negative or Also Positive Duties Under Article 13(4) ICESCR?*

Also article 13(4) ICESCR forms part of the freedom aspect of the right to education. It seeks to guarantee to individuals the freedom of private activity in the field of education and, in this way, to prevent the state from introducing a state monopoly in education. Primarily, article 13(4), therefore, gives rise to negative duties for states parties, which must be complied with immediately.

The question, however, is whether article 13(4) does not also entail certain positive duties for states parties—notably, whether article 13(4) does not also expect states parties to subsidise private schools. Private education may be subsidised in various forms: States parties could make actual financial awards to private schools, they could create tax advantages for private schools, or, more indirectly, they could grant financial assistance to parents who send their children to private schools. Article 13(4) is silent on the above question. It is thus useful to briefly examine some of the different opinions on whether international law requires states to subsidise private schools, as this may provide an indication of how article 13(4) should be interpreted.

Within the framework of the ECHR, the European Court of Human Rights, in the *Belgian Linguistic Case*, decided with regard to article 2 P-1 ECHR that "the Contracting Parties do not recognise such a right to education as would require them to establish at their own expense, or to subsidise, education of any particular type or at any particular level".[430] In

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[428] Para. 54 General Comment No. 13, see note 2, obliges states parties to "maintain a transparent and effective system to monitor such standards".

[429] Gebert, 1996, p. 647 holds that states parties may not lay down the requirement in terms of which a private school may only be established if a need exists for such school.

[430] *Case "relating to certain aspects of the laws on the use of languages in education in Belgium" (Merits)*, Judgement of 23 July 1968, Publications of the European Court of Human Rights, Series A, Vol. 6, p. 31, para. 3.

other words, states parties could also not be required to subsidise private schools. Reference should also be made to the case of *W. and K.L. v. Sweden*, dealt with by the former European Commission of Human Rights.[431] In this case, parents, who sent their children to a private school, offering education according to a specific pedagogical method, had applied to the municipality for financial aid in respect of their children's education. Their applications were rejected, however. The parents claimed that this amounted to a violation of article 2 P-1 ECHR read with article 14 ECHR (which protects the right to enjoy treaty rights without discrimination), as the financial aid was also granted in respect of children who attended state schools. The Commission decided, however, that states parties were not obliged to grant financial assistance to parents in order to respect their religious and philosophical convictions. States parties were only expected to allow the creation of private schools. The Commission further pointed out that the private school *in casu* in any event received financial support from the state.

Note should also be taken of two cases decided by the Human Rights Committee. In the case of *Carl Henrik Blom v. Sweden*,[432] the author of the communication, who had attended grade 10 at a private school during the school year 1981/82, applied for public financial aid in respect of the said school year. Grade 10 at the private school had, however, only been placed under state supervision after the school year had ended. In terms of Swedish law, a pupil of a private school could only be entitled to public financial aid if he attended a programme of courses placed under state supervision. Therefore, the application was rejected. The author claimed that this violated his right not to be discriminated against under article 26 ICCPR, because pupils of state schools had received public assistance for the school year 1981/82. The Committee did not uphold the author's claim, however, and held that a state party did not act in a discriminatory fashion, if it did not provide the same level of subsidy for public and private schools.[433]

Similarly, in the case of *G. and L. Lindgren and L. Holm* et al. *v. Sweden*,[434] parents, who sent their children to a private school, had applied to the municipality for financial aid for the purchase of their children's textbooks and for their school meals. Their applications were rejected, how-

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[431] Commission, Application No. 10476/83, *W. and K.L. v. Sweden*, DR 45 (1985), p. 143.

[432] *Carl Henrik Blom v. Sweden*, HRC, Communication No. 191/1985, 04/04/1988, UN Doc. CCPR/C/32/D/191/1985.

[433] *Ibidem* at 10.3.

[434] *G. and L. Lindgren and L. Holm, A. and B. Hjord, E. and I. Lundquist, L. Radko and E. Stahl v. Sweden*, HRC, Communications Nos. 298/1988 and 299/1988, 07/12/1990, UN Doc. CCPR/C/40/D/298/1988.

ever. The parents claimed that this amounted to discrimination in violation of article 26 ICCPR, since the financial aid was also granted in respect of children attending state schools and normally also children attending private schools. Regarding the allegation of discrimination of the stated private school *vis-à-vis* state schools,[435] the HRC observed that, in Sweden, public schooling and a variety of ancillary benefits, such as free textbooks and school meals, were available to all children. The state was not obliged to provide the same benefits to private schools. The Committee found that the preferential treatment given to public schooling was reasonable and based on objective criteria. The parents of Swedish children were free to take advantage of public schooling or to choose private schooling for their children. In the latter instance, certain benefits, notably textbooks and school meals, had to be paid by the parents, however. The Committee reasoned:

> The Committee notes that a State party cannot be deemed to discriminate against parents who freely choose not to avail themselves of benefits which are generally open to all.

Regarding the allegation of discrimination of the stated private school *vis-à-vis* other private schools,[436] the HRC held that, on the basis of the information before it, it could not conclude that the denial of a subsidy for textbooks and school meals for students attending the relevant private school had not been based on reasonable and objective criteria. The award of a subsidy, in Sweden, depends on the decision of the municipality concerned, which it makes having regard to the appropriateness of the private school in its particular education system.

Both HRC decisions related to the issue of state subsidies for private schools. It is important to appreciate, however, that the Committee left open whether the Covenant, in certain cases, entails a duty to provide some state funding for private schools. It only decided that the fact that private schools, freely chosen, do not receive the same level of funding as state schools, does not amount to discrimination.[437] Good arguments exist why states parties to the ICESCR should be positively obliged to provide some funding for private schools. A mere negative reading of article 13(4) conflicts with the nature of the ICESCR as an instrument protecting ESCR. Article 13(4) must also be read with article 2(2), which, it has been stated, expects states parties to make an effort to achieve equal opportunities and

[435] *Ibidem* at 10.3.
[436] *Ibidem* at 10.4.
[437] This is also emphasised by Martin Scheinin, in his concurring individual opinion in the case of *Arieh Hollis Waldman v. Canada*, HRC, Communication No. 694/1996, 05/11/1999, UN Doc. CCPR/C/67/D/694/1996, at 3.

equal treatment for all in the enjoyment of Covenant rights. In many instances, the right of persons belonging to vulnerable groups, such as minorities, to establish and maintain private schools will remain illusory if the state does not provide financial assistance. More often than not, minorities, for whom private schools are eminently suited for purposes of preserving their cultural identity, lack the means necessary to found their own schools. It has already been stated that the freedom aspect of the right to education also includes the right of parents to choose for their children private schools. This right can only be exercised on the basis of equality, however, if private schools are not too expensive, which is possible only through state financing.[438] Luzius Wildhaber thus opines that the case law of the European Commission and Court of Human Rights should be developed so as to recognise a duty of the state to subsidise private schools to the extent necessary, to prevent children from being denied access to private education solely for economic reasons, and further to prevent private schools from being financially severely worse off than state schools without justification.[439]

Even so, the CESCR, in General Comment No. 13, states as follows:

> A State party has no obligation to fund institutions established in accordance with article 13(3) and (4); however, if a State elects to make a financial contribution to private educational institutions, it must do so without discrimination on any of the prohibited grounds.[440]

In the light of the observations made above, the wisdom of the Committee's comment should be doubted. As has been pointed out by Geraldine van Bueren, it is anachronistic that "states which seek to abolish private education directly would clearly breach international law" but that "the same goal may be achieved with impunity indirectly through the abolition of tax advantages for private schools".[441] With all due respect, it is submitted that article 13(4) ICESCR should be interpreted as obliging states parties to subsidise private schools to an equitable extent. It is suggested that the correct approach is that reflected in Principle 9, Part I, of the *Resolution on Freedom of Education in the European Community*.[442] It states:

> In accordance with the right to freedom of education, Member States shall be required to provide the financial means whereby this right can be exer-

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[438] See the written statement of the International Organisation for the Development of Freedom of Education (OIDEL) to the Commission on Human Rights, UN Doc. E/CN.4/1993/NGO/25, para. 7.

[439] See Wildhaber, 1986/2000, p. 15, para. 49.

[440] General Comment No. 13, see note 2, para. 54.

[441] Van Bueren, 1995, p. 245.

[442] Resolution of 14 March 1984.

> cised in practice, and to make the necessary public grants to enable schools to carry out their tasks and fulfil their duties under the same conditions as in corresponding State establishments, without discrimination as regards administration, parents, pupils or staff[.]
>
> Notwithstanding this, however, freely established schools shall be required to make a certain contribution of their own as a token of their own responsibility and as a means of supporting their independent status.

5.2.3. *The Justiciability of Article 13(4) ICESCR*

As a freedom right, providing protection against undue state interference, article 13(4) ICESCR is fully justiciable.

6. *A Typology of State Obligations (Obligations to Respect, Protect and Fulfil) to Analyse the Normative Content of the Right to Education, as Protected in Article 13 ICESCR*

The present Chapter is concluded by suggesting that the tri-partite typology of state obligations discussed in Chapter 3, in terms of which all human rights, both CPR as well as ESCR, entail obligations to respect, protect and fulfil, may be usefully applied to analyse the normative content of the right to education, as protected in article 13. The typology of state obligations has been discussed above, in an attempt to dispute the contention that ESCR differ fundamentally from CPR.[443] *Obligations to respect* forbid states to act in contravention of human rights. *Obligations to protect* direct states to take measures to prohibit and prevent violations of human rights by third parties. *Obligations to fulfil* oblige states to take positive steps aimed at realising human rights. They normally demand a financial input. Although they may require immediate action, they are usually to be implemented on a progressive basis.[444] The CESCR, in General Comment No. 13, states:

> The right to education, like all human rights, imposes three types or levels of obligations on States parties: the obligations to respect, protect and fulfil. In turn, the obligation to fulfil incorporates both an obligation to facilitate and an obligation to provide.[445]

The CESCR goes on to define each type of obligation with regard to the right to education:

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[443] See 3.4.2. *supra.*

[444] In this context, note should be taken of art. 2(1) ICESCR, which obliges states parties to realise Covenant rights progressively, in accordance with the resources they have at their disposal. The nature and scope of art. 2(1) has been discussed at 9.2. *supra.*

[445] General Comment No. 13, see note 2, para. 46.

> The obligation to respect requires States parties to avoid measures that hinder or prevent the enjoyment of the right to education. The obligation to protect requires States parties to take measures that prevent third parties from interfering with the enjoyment of the right to education. The obligation to fulfil (facilitate) requires States to take positive measures that enable and assist individuals and communities to enjoy the right to education. Finally, States parties have an obligation to fulfil (provide) the right to education. As a general rule, States parties are obliged to fulfil (provide) a specific right in the Covenant when an individual or group is unable, for reasons beyond their control, to realise the right themselves by the means at their disposal. However, the extent of this obligation is always subject to the text of the Covenant.[446]

The fact that article 13(2)(e) ICESCR recognises that states parties must actively pursue the development of a system of schools at all levels, makes it clear that "article 13 regards States as having principal responsibility for the direct provision of education in most circumstances".[447] In other words, concerning the obligation to fulfil in the case of the right to education, the duty to provide is more pronounced than the duty to facilitate. The latter duty would leave it largely to individuals and communities themselves to realise their right to education. The state's obligation would be merely to create the necessary framework to enable them to do so. It should further be noted that "given the differential wording of article 13(2) in relation to primary, secondary, higher and fundamental education, the parameters of a State party's obligation to fulfil (provide) are not the same for all levels of education".[448] The scope of the obligation to fulfil and the degree of urgency of its realisation decrease from a high level for primary education to successively lower levels for each of secondary, higher and fundamental education.

The tri-partite typology of state obligations may be usefully applied to analyse the normative content of the right to education and to specify the nature and content of corresponding state obligations under the right.[449] This may be done by identifying which obligations to respect, protect and fulfil the right to education, in fact, entails. These would have to be identified with regard to both the social and the freedom aspect of the right to education. Concerning the social aspect, obligations would have to be identified regarding each of the "essential features" of the social aspect of the right to education, *i.e.* the availability, accessibility, acceptability and adaptability of education. Concerning the freedom aspect, these

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[446] *Ibidem* at para. 47.
[447] *Ibidem* at para. 48.
[448] *Idem.*
[449] This has first been suggested by Fons Coomans. See Coomans, 1992, pp. 233–235, Coomans, 1995, pp. 22–24 and p. 26 and Coomans, 1998a, paras. 25–26 and Appendix (UN Doc. E/C.12/1998/16).

would have to be identified regarding the freedom to choose as well as the freedom to establish. The suggested analysis will not be attempted here, as this requires thorough research which falls outside the ambit of the present book. It must suffice to refer to the example which the Committee mentions, concerning the availability, accessibility, acceptability and adaptability of education:

> By way of illustration, a State must respect the availability of education by not closing private schools; protect the accessibility of education by ensuring that third parties, including parents and employers, do not stop girls from going to school; fulfil (facilitate) the acceptability of education by taking positive measures to ensure that education is culturally appropriate for minorities and indigenous peoples, and of good quality for all; fulfil (provide) the adaptability of education by designing and providing resources for curricula which reflect the contemporary needs of students in a changing world; and fulfil (provide) the availability of education by actively developing a system of schools, including building classrooms, delivering programmes, providing teaching materials, training teachers and paying them domestically competitive salaries.[450]

[450] General Comment No. 13, see note 2, para. 50.

CHAPTER ELEVEN

THE RIGHT TO EDUCATION IN THE CONCLUDING OBSERVATIONS OF THE COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

1. *Introduction*

In the discussion which follows, the Concluding Observations of the Committee on Economic, Social and Cultural Rights will be examined, in as far as they address the right to education in article 13 ICESCR, in an effort to discern the Committee's understanding of the content of that right. It has been stated that although the CESCR's Concluding Observations are not legally binding, they are, nevertheless, indicative of the opinion of a capable expert body.[1] If one leaves aside the holding of Days of General Discussion and the issuing of General Comments by the Committee for the moment, the adoption of Concluding Observations following the consideration of state reports constitutes the most important method of clarifying the normative content of Covenant rights. It is, admittedly, a rather cumbersome method of doing so, but, in the absence of an individual petition procedure to the ICESCR, it is the best method available. In contrast to the reports of UNESCO's Committee on Conventions and Recommendations (which are prepared as part of the process of consultations based on state reports, in the supervision of the CDE), which until now have not facilitated norm clarification to any considerable extent,[2] the CESCR's Concluding Observations have been more effective in this regard. The discussion below will refer to the Committee's views on various aspects of the right to education under the headings:

- progressive realisation of the right to education;
- discrimination in education and disadvantaged groups;
- the aims of education;
- primary and fundamental education;
- secondary, and technical and vocational education;
- higher education;
- a system of schools, a fellowship system and teaching staff;

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[1] See 8.4.3. *supra.*
[2] See 6.2.2.1.3.2. *supra.*

- parental rights and private schools; and
- other matters.

In view of the abundance of information or "jurisprudence" produced by the Committee and the limited space at the disposal of the writer, the discussion will only refer to examples from the Concluding Observations. It has, however, been attempted to provide references to other important views of the Committee on the right to education in the footnotes. The analysis covers the Committee's Concluding Observations from the eighth session (May 1993)[3] until the thirty-first session (November 2003). The study will focus on the parts of the Concluding Observations, entitled "Principal subjects of concern" and "Suggestions and recommendations". In the former, the Committee indicates whether it considers a situation with regard to the realisation of a particular Covenant right to be unsatisfactory, in the latter, it suggests or recommends improvements.

Finally, and by way of comparison, a few comments will be made on the Concluding Observations of the Committee on the Rights of the Child, in as far as they address the right to education in articles 28 and 29 CRC.

2. *The Concluding Observations of the Committee on Economic, Social and Cultural Rights*

2.1. *Progressive Realisation of the Right to Education*

Article 13 ICESCR read with article 2(1) ICESCR obliges states parties *to progressively achieve the realisation* of the right to education. When reviewing the implementation of the ICESCR by Mali, the CESCR hence expressed its concern "about the fact that Mali has shown only modest progress in terms of educational standards over the past 20 years and has actually been regressing over the past 10 years". The Committee noted that formal primary schooling still did not meet the needs of the population, that the rate of school enrolment in Mali was among the lowest in the world, and that repeat and drop-out rates were very high.[4] The notion of "progressive realisation" excludes retrogressive measures, notably in the form of the introduction or increase of study fees. In its Concluding Observations on the report of Nigeria, the Committee thus stated that it "regrets

[3] Since the eighth session, the CESCR's Concluding Observations follow the same structure as those of the Human Rights Committee and the Committee on the Rights of the Child and contain parts on "Principal subjects of concern" and "Suggestions and recommendations".

[4] Concluding Observations of the CESCR: Mali (without report), 11th Session, reproduced in UN Doc. E/1995/22, para. 352.

the fact . . . that the authorities have reintroduced primary school fees in certain States",[5] that "there has been a marked reduction in school-age children going to school as parents cannot afford to pay the new drastically increased school fees for primary and secondary school"[6] and that "[u]niversity fees increased dramatically in 1997".[7]

Article 13 read with article 2(1) further directs states parties, in implementing the right to education, to take steps *to the maximum of their available resources*. In the case of the Czech Republic, the Committee referred to the "constant decrease in the budget expenditure allocated to education and the consequences thereof on the enjoyment of the right to education".[8] The Committee suggested to the Czech Republic that it "consider increasing the budget allocation for education".[9] Similarly, in the case of Panama, the Committee expressed its concern "about the inadequacy of resources allocated to address the problems of primary and secondary education"[10] and requested Panama "to take measures aimed at increasing the resources available to fight illiteracy and promote primary and secondary education".[11] In its Concluding Observations on the report of Uruguay, the Committee considered that "the resources devoted to . . . education are inadequate", as manifested "by the continued deterioration of teachers' salaries in terms of purchasing power"[12] and that Uruguay should "take measures to increase the real salaries of teachers".[13] In its Concluding Observations on the report of Paraguay, the Committee expressed its concern at "[t]he decline in the quality of education"[14] and recommended to Paraguay that it should "energetically pursue its efforts and increase its investment in education, particularly primary education".[15]

In arriving at the conclusion that a state party did not make available the maximum resources, the Committee occasionally compared the state party's expenditures on education with its expenditures on other budgetary

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[5] Concluding Observations of the CESCR: Nigeria (initial report), 18th Session, reproduced in UN Doc. E/1999/22, para. 124.

[6] UN Doc. E/1999/22, para. 125.

[7] UN Doc. E/1999/22, para. 126.

[8] Concluding Observations of the CESCR: Czech Republic (initial report), 28th Session, reproduced in UN Doc. E/2003/22, para. 91.

[9] UN Doc. E/2003/22, para. 110.

[10] Concluding Observations of the CESCR: Panama (second periodic report), 26th Session, reproduced in UN Doc. E/2002/22, para. 461.

[11] UN Doc. E/2002/22, para. 479.

[12] Concluding Observations of the CESCR: Uruguay (second periodic report), 17th Session, reproduced in UN Doc. E/1998/22, para. 368.

[13] UN Doc. E/1998/22, para. 378.

[14] Concluding Observations of the CESCR: Paraguay (initial report), 14th Session, reproduced in UN Doc. E/1997/22, para. 79.

[15] UN Doc. E/1997/22, para. 91.

items. In the case of Algeria, the Committee noted with concern "a significant decrease in public spending on . . . education in the 1990s, as a percentage of both GNP and GDP, and also relative to military expenditure, which more than doubled as a percentage of GDP".[16] At other times, the Committee compared the situation as regards education with that prevailing in other countries. In its Concluding Observations on the report of the Dominican Republic, the Committee noted with great concern that "State expenditures on education and training as a proportion of public expenditure are less than half their average in Latin America".[17]

States parties must at all times, even where the available resources are inadequate, strive to ensure the widest possible enjoyment of the right to education under the prevailing circumstances. Former communist countries in transition to free market economic systems often experience resource constraints, and there is a constant danger that these may impact negatively on their education systems. The Committee has, therefore, in its Concluding Observations on the report of the Russian Federation, expressed its concern "with regard to the deterioration of the educational system in the Russian Federation and its effects on school achievement levels, as well as on attendance and drop-out rates among the young at all levels of the system", and it recommended that "firmer and more effective measures be adopted to reinforce the educational system, reduce the school drop-out rate and enhance the protection of children against illegal employment and other abuses".[18] Also states parties obliged to comply with the terms of Structural Adjustment Programmes must, nevertheless, ensure the widest possible enjoyment of the right to education under the circumstances. In the case of Guinea, the Committee thus stated that it "regrets that the

[16] Concluding Observations of the CESCR: Algeria (second periodic report), 27th Session, reproduced in UN Doc. E/2002/22, para. 826. See also Concluding Observations of the CESCR: Armenia (initial report), 21st Session, reproduced in UN Doc. E/2000/22, para. 306 (comparison of the percentage of government allocations for education with allocations for other sectors).

[17] Concluding Observations of the CESCR: Dominican Republic (second periodic report), 15th Session, reproduced in UN Doc. E/1997/22, para. 228. See also Concluding Observations of the CESCR: Portugal (second periodic report), 12th Session, reproduced in UN Doc. E/1996/22, para. 96 (comparison of secondary and higher education enrolment rates with those of countries with a comparable stage of development).

[18] Concluding Observations of the CESCR: Russian Federation (third periodic report), 16th Session, reproduced in UN Doc. E/1998/22, paras. 115 and 129. See also Concluding Observations of the CESCR: Ukraine (fourth periodic report), 26th Session, reproduced in UN Doc. E/2002/22, paras. 498 and 513 (budget allocated to education fallen sharply, leading to deterioration in the quality of education) and Concluding Observations of the CESCR: Azerbaijan (initial report), 17th Session, reproduced in UN Doc. E/1998/22, paras. 342 and 355 (general shortage of resources is weakening the educational system and corrupting the traditionally high educational standards of the state party).

Guinean Government has not given enough priority in the structural adjustment agreement to schooling and education".[19]

2.2. *Discrimination in Education and Disadvantaged Groups*

Article 13 ICESCR read with article 2(2) ICESCR guarantees that the right to education can be exercised without discrimination on certain grounds. States parties must eradicate all forms of "active" and, it has been argued, also "static" discrimination in the sphere of education. The practice of the CESCR reveals that discrimination against specific vulnerable groups in society is viewed as an obstacle to the full realisation of the rights of the Covenant. The Committee has thus addressed the sometimes deplorable educational situation of girls and women, various categories of non-nationals, those residing in poorer regions, disabled and older persons, particular linguistic groups, minorities and indigenous peoples.[20]

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[19] Concluding Observations of the CESCR: Guinea (without report), 14th Session, reproduced in UN Doc. E/1997/22, para. 208. See also Concluding Observations of the CESCR: Senegal (initial report concerning the rights covered by articles 6 to 9 ICESCR), 9th Session, reproduced in UN Doc. E/1994/23, para. 261 (concern that budgetary cutbacks carried out in the educational sector under the programme of structural adjustment will have serious social and economic consequences for the future of the country).

[20] The CESCR has also addressed the educational situation of the following disadvantaged groups in society: Concluding Observations of the CESCR: Democratic People's Republic of Korea (second periodic report), 31st Session, reproduced in UN Doc. E/2004/22, paras. 529 and 550 (concern that *orphans* are kept in segregated environments and not included in the regular school system), Concluding Observations of the CESCR: Morocco (second periodic report), 24th Session, reproduced in UN Doc. E/2001/22, para. 566 (education programmes for *nomadic peoples*), Concluding Observations of the CESCR: Mongolia (third periodic report), 23rd Session, reproduced in UN Doc. E/2001/22, para. 275 (high incidence of school drop-out among *herder families* where children have to work), Concluding Observations of the CESCR: Denmark (third periodic report), 20th Session, reproduced in UN Doc. E/2000/22, paras. 108 and 116 (increase in the school drop-out rate, which particularly affects children from *economically disadvantaged groups*), Concluding Observations of the CESCR: Ireland (initial report), 20th Session, reproduced in UN Doc. E/2000/22, para. 138 (high rate of illiteracy among children of *the traveller community*), Concluding Observations of the CESCR: Israel (initial report), 19th Session, reproduced in UN Doc. E/1999/22, paras. 255 and 269 (drop-out rates are higher and eligibility for matriculation certificates is lower for *Arabs*; educational expenditure *per capita* for the Arab sector is substantially less than for the Jewish sector), Concluding Observations of the CESCR: El Salvador (initial report), 14th Session, reproduced in UN Doc. E/1997/22, para. 180 (measures should be taken to enable *working children* to receive an adequate education), Concluding Observations of the CESCR: Guatemala (initial report), 14th Session, reproduced in UN Doc. E/1997/22, para. 135 (persisting problems of illiteracy and lack of access to education as they affect *the poorest sectors of the population*), Concluding Observations of the CESCR: United Kingdom of Great Britain and Northern Ireland (part dealing with the United Kingdom of Great Britain and Northern Ireland and its Dependent Territories, with the exception of Hong Kong) (second periodic reports concerning the rights covered by articles 10 to 12 and 13 to 15 ICESCR), 11th Session, reproduced in UN Doc. E/1995/22, para. 275 (grave disparities in the level of education depending on *the social origin of the*

2.2.1. *Girls and Women*

The CESCR has noted with concern that discrimination against girls and women in education continues to exist in many states parties.[21] When reviewing the state of implementation of ESCR in Mali, for example, the Committee observed that "females in Mali receive only 29 per cent as much schooling as males" and that "[t]he adult literacy rate among women is half that of men".[22] But, also the developed states of the West sometimes do not fare much better. With regard to Germany, the Committee expressed concern "over the disparity which appears to exist . . . between men and women with regard to educational achievements and the participation of women in all levels of education and professional careers" and recommended that "positive action be taken by the German authorities to guarantee . . . equality of opportunities of men and women in that field".[23]

In many states of the third world, cultural and traditional beliefs, or highly stereotyped perceptions of the role of women in society, lie at the root of discrimination against women in education. Discrimination is reflected in, for instance, a great disparity in enrolment in primary schools between girls and boys,[24] a low enrolment of girls/women at the primary, secondary and tertiary levels of education,[25] or a high illiteracy rate for women, limited access of girls to education and a high school drop-out rate among girls.[26] The Committee has repeatedly made it clear that all such forms of discrimination must be eliminated. In its Concluding Observations on the report of Benin, the Committee noted with concern "the cultural prefer-

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pupil) and Concluding Observations of the CESCR: Islamic Republic of Iran (initial report), 8th Session, reproduced in UN Doc. E/1994/23, para. 126 (discrimination on religious grounds in the educational system; prohibition of the admission to university of *Baha'is*).

[21] Occasionally, however, the CESCR addressed the situation of boys and men in education. See, for example, Concluding Observations of the CESCR: Egypt (initial report), 22nd Session, reproduced in UN Doc. E/2001/22, paras. 166 and 182 (high drop-out rates for boys) and Concluding Observations of the CESCR: Iceland (second periodic report), 20th Session, reproduced in UN Doc. E/2000/22, para. 83 (only 40 per cent of university graduates are male).

[22] Concluding Observations of the CESCR: Mali (without report), 11th Session, reproduced in UN Doc. E/1995/22, para. 344.

[23] Concluding Observations of the CESCR: Germany (second periodic report concerning the rights covered by articles 13 to 15 ICESCR), 9th Session, reproduced in UN Doc. E/1994/23, paras. 250 and 251. See also Concluding Observations of the CESCR: Spain (third periodic report), 14th Session, reproduced in UN Doc. E/1997/22, paras. 100 and 107 (discrimination as regards access to education) and paras. 103 and 110 (a worrying rate of illiteracy, especially among women).

[24] Concluding Observations of the CESCR: Nepal (initial report), 26th Session, reproduced in UN Doc. E/2002/22, para. 552.

[25] Concluding Observations of the CESCR: Togo (without report), 25th Session, reproduced in UN Doc. E/2002/22, para. 318.

[26] Concluding Observations of the CESCR: Guinea (without report), 14th Session, reproduced in UN Doc. E/1997/22, para. 208.

ence given in educational matters to male children"[27] and stated that efforts should be taken "to provide girls and boys with equal access to education".[28] In other societies, discrimination against women in education is grounded in religious beliefs. This is often the case in Islamic countries. In its examination of the report of Algeria, the Committee thus deplored the fact that a fundamental right, such as the right to education, was not fully guaranteed for Algerian women. The Committee called upon Algeria to ensure that girls were fully able to exercise their right to education.[29] Discrimination is reflected in the fact, for instance, that the access of young girls to education is considerably more limited and that the adult illiteracy rate for women is very high.[30]

Many other aspects of discrimination against women in education have been addressed by the Committee. With regard to Cameroon, for example, the Committee regretted "the requirement of a parental contribution in the form of compulsory fees levied by primary schools which, in view of high levels of poverty, greatly restrict access to primary education, particularly for girls".[31] Concerning the report of Switzerland, the Committee referred to "the comparatively low proportion of women in higher education".[32]

2.2.2. *Non-nationals*

The Committee has also dealt with discrimination in education as experienced by various categories of non-nationals.

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[27] Concluding Observations of the CESCR: Benin (initial report), 28th Session, reproduced in UN Doc. E/2003/22, para. 179.

[28] UN Doc. E/2003/22, para. 198.

[29] Concluding Observations of the CESCR: Algeria (initial report), 13th Session, reproduced in UN Doc. E/1996/22, paras. 294 and 303. See also Concluding Observations of the CESCR: Iraq (second periodic report concerning the rights covered by articles 13 to 15 ICESCR), 10th Session, reproduced in UN Doc. E/1995/22, paras. 133 and 141 (the fundamental importance of according equal priority to the education of women emphasised).

[30] Concluding Observations of the CESCR: Morocco (second periodic report), 24th Session, reproduced in UN Doc. E/2001/22, para. 543. See also Concluding Observations of the CESCR: Egypt (initial report), 22nd Session, reproduced in UN Doc. E/2001/22, para. 166 (inequality of access to education between boys and girls, and high illiteracy rates among adults, particularly women) and Concluding Observations of the CESCR: Tunisia (second periodic report), 20th Session, reproduced in UN Doc. E/2000/22, para. 169 (serious disparities continue to exist between the literacy rates of boys and girls at all age levels).

[31] Concluding Observations of the CESCR: Cameroon (initial report), 21st Session, reproduced in UN Doc. E/2000/22, paras. 341 and 357. See also Concluding Observations of the CESCR: Republic of Korea (initial report), 12th Session, reproduced in UN Doc. E/1996/22, paras. 73 and 84 (the high cost of secondary and higher education contributes to the low rate of female participation).

[32] Concluding Observations of the CESCR: Switzerland (initial report), 19th Session, reproduced in UN Doc. E/1999/22, paras. 356 and 371. See also Concluding Observations of the CESCR: Republic of Korea (second periodic report), 25th Session, reproduced in UN Doc. E/2002/22, paras. 238 and 252 (over two thirds of the students in higher education are males, which is contrary to the principle of gender equality).

Above it has been argued that non-nationals, who ordinarily reside in a state party, should be held to be entitled to the same treatment as nationals with regard to all aspects of article 13.[33] This also appears to be the approach of the Committee. The Committee has thus confirmed the educational rights of migrant workers in a regular situation and their children. In its Concluding Observations on the report of Portugal, the Committee noted that foreign workers could not enrol in the vocational training courses to which Portuguese workers were entitled.[34] The Committee urged Portugal to allow them to do so.[35] Considering the report of the United Kingdom on Hong Kong, the Committee noted with concern that the Hong Kong government had not made sufficient efforts to ensure school placements for the children of immigrant families from China, and to protect them from discrimination.[36] It recommended that measures to integrate them into the general education system be implemented with maximum possible attention from government authorities.[37] The Committee has also confirmed the educational rights of refugees. In its examination of the report of Nepal, the Committee noted with concern that "Bhutanese refugees . . . do not have access to the same . . . educational facilities as Nepalese citizens".[38] When addressing the report of Canada, the Committee commented that it "is concerned that loan programmes for post-secondary education are available only to Canadian citizens and permanent residents and that recognised refugees who do not have permanent residence status . . . are ineligible for these loan programmes".[39] Hence, in the Committee's opinion, refugees should be treated on the same footing as nationals with regard to the enjoyment of the right to education.[40]

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[33] See 9.3.3.1. *supra.*

[34] Concluding Observations of the CESCR: Portugal (third periodic report), 24th Session, reproduced in UN Doc. E/2001/22, para. 413.

[35] UN Doc. E/2001/22, para. 421.

[36] Concluding Observations of the CESCR: United Kingdom of Great Britain and Northern Ireland (Hong Kong) (third periodic report), 15th Session, reproduced in UN Doc. E/1997/22, para. 352.

[37] UN Doc. E/1997/22, para. 365.

[38] Concluding Observations of the CESCR: Nepal (initial report), 26th Session, reproduced in UN Doc. E/2002/22, para. 545.

[39] Concluding Observations of the CESCR: Canada (third periodic report), 19th Session, reproduced in UN Doc. E/1999/22, para. 414.

[40] Internally displaced persons, although nationals of the state concerned, are in a similar position as refugees. In its Concluding Observations on the report of the Sudan, the CESCR urged "the State party to address the root causes of the problem of internally displaced persons and in the short and medium term, to co-operate fully with international and non-governmental organisations in the field, in order to provide for adequate (interim) measures ensuring the basic needs of this group, [including] . . . the continuation of education for their children". Concluding Observations of the CESCR: Sudan (initial report), 23rd Session, reproduced in UN Doc. E/2001/22, para. 324. See also Concluding Observations of the CESCR: Georgia (second periodic report), 29th Session, reproduced in UN Doc.

The situation is more complicated, however, in as far as asylum-seekers and illegal immigrants and their children are concerned. Above it has been argued that, at a minimum, these persons should be considered to be entitled to enjoy those aspects of article 13 which form part of the core content of the right to education.[41] The Committee has thus, in a rather outspoken manner, asserted the right to education of the children of asylum-seekers. Concerning an earlier report of the United Kingdom on Hong Kong, the Committee stated that it "is deeply concerned by the information it has received about the treatment of Vietnamese asylum-seekers in Hong Kong", that it "is particularly concerned about the situation of the children and is alarmed by the statements made by the Government that these children have no entitlement to the enjoyment of the right to education or to other rights in view of their status as 'illegal immigrants'" and that, in fact, it "considers the situation inconsistent with obligations set forth in the Covenant". The Committee thus urged "the Hong Kong Government to take immediate steps to ensure that children in refugee camps and those released from them are accorded full enjoyment of the economic, social and cultural rights guaranteed to them under the Covenant".[42] The practice of the Committee similarly supports educational rights for the children of illegal immigrants. In its Concluding Observations on the report of Croatia, the Committee noted with concern that "children of undocumented aliens may not be going to school"[43] and recommended that "immediate steps be taken" to ensure that they were able to go to school.[44] Reviewing the report of the Dominican Republic, the Committee stated that it "is particularly concerned" about the situation of the children of Haitian illegal immigrants who did not receive Dominican nationality and were thus denied "their most basic social rights, such as

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E/2003/22, paras. 411 and 430 (deep concern about the situation of internally displaced persons, whose basic needs with regard to *inter alia* education have only partially been met; a comprehensive programme of action aiming to ensure more adequately *inter alia* their right to education should be adopted) and Concluding Observations of the CESCR: Sri Lanka (initial report), 18th Session, reproduced in UN Doc. E/1999/22, para. 71 (grave concern regarding the situation of internally displaced persons, who lack *inter alia* basic education).

[41] See 9.3.3.1. *supra*.

[42] Concluding Observations of the CESCR: United Kingdom of Great Britain and Northern Ireland (part dealing with Hong Kong) (second periodic reports concerning the rights covered by articles 10 to 12 and 13 to 15 ICESCR), 11th Session, reproduced in UN Doc. E/1995/22, paras. 291 and 300. See also Concluding Observations of the CESCR: Senegal (second periodic report), 26th Session, reproduced in UN Doc. E/2002/22, paras. 359 and 380 (children of asylum-seekers cannot enrol in school unless they are able to pay tuition fees; education should, however, be free for them).

[43] Concluding Observations of the CESCR: Croatia (initial report), 27th Session, reproduced in UN Doc. E/2002/22, para. 902.

[44] UN Doc. E/2002/22, para. 919.

the rights to education and health care".[45] The Committee recommended that the principle of *ius soli* be applied to the children "without delay".[46]

2.2.3. *Persons Residing in Poorer Regions of a Country*

The Committee has further identified persons residing in poorer regions of a country as a group often exposed to discrimination in education. According to the Committee, states parties must take measures to ensure that all persons, wherever they live, can equally enjoy the right to education under the Covenant. In many states parties, persons living in rural areas are disadvantaged when compared with those living in urban areas. Concerning the report of Cameroon, the Committee stated that it "is deeply concerned about the inadequate salaries earned by teachers and the lack of school buildings and other infrastructure and of services, particularly in rural areas". The state party should take steps "to allocate increased resources to education, in particular for infrastructure and human resources, especially in rural areas".[47] But, the disparities may also exist between entire regions of a country. Commenting on Tunisia's report, the Committee expressed its concern about the disparities of living standards, also with regard to education, "to be found between the prosperous north-east coast of Tunisia and the underdeveloped north-west, between the interior of the country and the south, and between the towns and rural areas". The Committee, therefore, recommended to Tunisia that it "develop an immediate national plan of action in order to reduce the disparities of living standards that exist between the various regions".[48]

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[45] Concluding Observations of the CESCR: Dominican Republic (second periodic report), 17th Session, reproduced in UN Doc. E/1998/22, para. 216.

[46] UN Doc. E/1998/22, para. 233.

[47] Concluding Observations of the CESCR: Cameroon (initial report), 21st Session, reproduced in UN Doc. E/2000/22, paras. 342 and 357. See also Concluding Observations of the CESCR: Republic of Korea (second periodic report), 25th Session, reproduced in UN Doc. E/2002/22, para. 232 (concern expressed at the fact that most government programmes to develop education are highly concentrated in the urban areas).

[48] Concluding Observations of the CESCR: Tunisia (second periodic report), 20th Session, reproduced in UN Doc. E/2000/22, paras. 168 and 179. See also Concluding Observations of the CESCR: Russian Federation (fourth periodic report), 31st Session, reproduced in UN Doc. E/2004/22, paras. 452 and 480 (concern about the problems faced by people in the Republic of Chechnya with regard to the provision of education; sufficient funds should be allocated to reinstate the education infrastructure in the Republic of Chechnya), Concluding Observations of the CESCR: Germany (third periodic report), 19th Session, reproduced in UN Doc. E/1999/22, paras. 313 and 328 (in view of high unemployment in eastern Germany, state party should implement educational programmes for young people to create employment and to improve the level of employment in eastern Germany) and Concluding Observations of the CESCR: United Kingdom of Great Britain and Northern Ireland (part dealing with the United Kingdom of Great Britain and Northern Ireland and its Dependent Territories, with the exception of Hong Kong) (second periodic

2.2.4. *Disabled and Older Persons*

Other disadvantaged groups in education are disabled and older persons. On a number of occasions, the Committee has emphasised that these groups should fully enjoy the right to education. Reviewing the report of the United Kingdom, the Committee regretted "the lack of sufficient opportunities available to persons with disabilities to pursue their right to education within the mainstream". The Committee, accordingly, urged the government "to make an enhanced effort to assess the needs" of persons with disabilities in relation to their right to education.[49] Considering the report of Australia, the Committee underscored the importance which it attached to the ESCR of the elderly and, therefore, urged the government "to direct major efforts towards assessing and addressing the needs" of this group in relation to the right to education.[50]

2.2.5. *Particular Linguistic Groups*

It has been argued above that articles 2(2) and 13 should be read widely to protect also the educational needs of particular linguistic groups, notably their right to be educated in the mother tongue in appropriate circumstances.[51] In its examination of state reports, the Committee clearly shows

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reports concerning the rights covered by articles 10 to 12 and 13 to 15 ICESCR), 11th Session, reproduced in UN Doc. E/1995/22, para. 275 (regional differences in the quality of the education provided a matter of concern).

[49] Concluding Observations of the CESCR: United Kingdom of Great Britain and Northern Ireland (part dealing with the United Kingdom of Great Britain and Northern Ireland and its Dependent Territories, with the exception of Hong Kong) (second periodic reports concerning the rights covered by articles 10 to 12 and 13 to 15 ICESCR), 11th Session, reproduced in UN Doc. E/1995/22, paras. 276 and 279. See also Concluding Observations of the CESCR: Democratic People's Republic of Korea (second periodic report), 31st Session, reproduced in UN Doc. E/2004/22, paras. 534 and 555 (concern that children with disabilities, whenever possible, are not included in the regular school system; children with disabilities should be educated in the regular school system), Concluding Observations of the CESCR: Portugal (Macau) (second periodic report), 15th Session, reproduced in UN Doc. E/1997/22, paras. 254 and 259 (concern that no special programme exists to help the physically and mentally disabled to facilitate their access to education) and Concluding Observations of the CESCR: Australia (second periodic report concerning the rights covered by articles 13 to 15 ICESCR), 8th Session, reproduced in UN Doc. E/1994/23, paras. 151 and 159 (concern about the lack of opportunities available to persons with disabilities to fully enjoy their right to education).

[50] Concluding Observations of the CESCR: Australia (second periodic report concerning the rights covered by articles 13 to 15 ICESCR), 8th Session, reproduced in UN Doc. E/1994/23, para. 159. See also Concluding Observations of the CESCR: Germany (second periodic report concerning the rights covered by articles 13 to 15 ICESCR), 9th Session, reproduced in UN Doc. E/1994/23, para. 252 (information should be provided on measures taken to facilitate the access and the participation of the elderly in educational programmes).

[51] See 9.3.3.2. *supra.*

that it supports such a right. Considering the report of France, the Committee thus recommended to the state party that it "increase its efforts to preserve regional and minority cultures and languages, and that it undertake measures to improve education on, and education in, these languages".[52] In the case of the Netherlands Antilles, the Committee expressed its concern at the increase in the school drop-out rate and suggested that this was due to "the existence of several tongues spoken as first languages on the islands and the use of Dutch as the language of education". The Committee hence encouraged the state party, in addressing the problem of school drop-outs, "to expedite the implementation of its programme for education in the students' mother tongues along with the progressive introduction of Dutch".[53] This reflects the approach advanced in the OSCE's Hague Recommendations Regarding the Education Rights of National Minorities of 1996. Neither teaching exclusively in the official language nor exclusively in the mother tongue is in accordance with international law. The child's mother tongue must be used as the language of instruction and the official language should be introduced gradually.

2.2.6. *Minorities*

Related to the issue of language rights in education is the topic of the educational rights of members of minorities. Articles 2(2) and 13, read together, protect members of minorities against discrimination in education on the ground of their association with such communities. With regard to the report of Japan, the Committee, therefore, stated that it "is concerned about the persisting *de jure* and *de facto* discrimination against minority groups in Japanese society, [including] in the [field] of . . . education" and recommended to the state party that it should take "necessary measures" to combat such forms of discrimination in education.[54] But, it has

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[52] Concluding Observations of the CESCR: France (second periodic report), 27th Session, reproduced in UN Doc. E/2002/22, para. 875.

[53] Concluding Observations of the CESCR: Netherlands (Netherlands Antilles) (second periodic report), 18th Session, reproduced in UN Doc. E/1999/22, paras. 218 and 223. See also Concluding Observations of the CESCR: Israel (initial report), 19th Session, reproduced in UN Doc. E/1999/22, para. 269 (study should be made of viability of establishing an Arab university within Israel for the purpose of ensuring access to higher education for Arab citizens of Israel in the Arabic language), Concluding Observations of the CESCR: Suriname (initial report), 12th Session, reproduced in UN Doc. E/1996/22, paras. 163 and 170 (education only in Dutch, the official language of Suriname; no efforts made to promote the use of Sranan Tongo, spoken by most Surinamese; the use of Sranan Tongo in schools should be promoted) and Concluding Observations of the CESCR: Mauritius (without report), 10th Session, reproduced in UN Doc. E/1995/22, para. 181 (concern that Kreol and Bhojpuri, the only languages spoken by the large majority of the population, are not used in the Mauritian educational system).

[54] Concluding Observations of the CESCR: Japan (second periodic report), 26th Session,

been argued above that articles 2(2) and 13 should also be construed in such a manner as to protect special education rights for minorities.[55] This appears, in fact, to be the path followed by the Committee. Commenting further on the report of Japan, the Committee expressed its concern "about the fact that there are very limited possibilities for children of minorities to enjoy education in their own language and about their own culture in public schools" and that "minority schools, such as Korean schools, are not officially recognised, even when they adhere to the national education curriculum, and therefore neither receive central government subsidies nor are able to provide qualification for university entrance examinations". The Committee thus recommended that "mother tongue instruction be introduced in the official curricula of public schools enrolling a significant number of pupils belonging to linguistic minorities" and that "the State party officially recognise minority schools, in particular Korean schools, when they comply with the national education curriculum, and consequently make available to them subsidies and other financial assistance, and also recognise their school leaving certificates as university entrance examination qualifications".[56] The Committee further urged the state party "to ensure that school textbooks and other teaching materials present issues in a fair and balanced manner".[57] With regard to the Ukraine's report, the Committee recommended to the state party that it should "promote the participation of . . . communities, especially ethnic minorities, in school governance in order to improve enrolment rates and monitor the quality of education",[58] and with regard to the report of Poland, the Committee recommended

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reproduced in UN Doc. E/2002/22, paras. 592 and 619. See also Concluding Observations of the CESCR: Republic of the Congo (without report), 22nd Session, reproduced in UN Doc. E/2001/22, para. 203 (concern that the Pygmies, an ethnic minority, do not enjoy equal treatment in the predominantly Bantu society and are severely marginalised, including in the area of education) and Concluding Observations of the CESCR: Islamic Republic of Iran (initial report), 8th Session, reproduced in UN Doc. E/1994/23, para. 126 (insufficiency of the education offered to the children belonging to the Kurdish minority).

[55] See 9.3.3.3. *supra.*

[56] Concluding Observations of the CESCR: Japan (second periodic report), 26th Session, reproduced in UN Doc. E/2002/22, paras. 611 and 639. See also Concluding Observations of the CESCR: Estonia (initial report), 29th Session, reproduced in UN Doc. E/2003/22, paras. 515 and 540 (persisting lack of attention to the issue of the realisation of the right to education in minority languages; the state party should ensure that ethnic groups have ample opportunities to be educated in their own languages) and Concluding Observations of the CESCR: Bulgaria (third periodic report), 21st Session, reproduced in UN Doc. E/2000/22, paras. 231 and 239 (lack of opportunities for minorities to receive education in their own languages; the opportunity to be educated in their own languages should be provided).

[57] Concluding Observations of the CESCR: Japan (second periodic report), 26th Session, reproduced in UN Doc. E/2002/22, para. 638.

[58] Concluding Observations of the CESCR: Ukraine (fourth periodic report), 26th Session, reproduced in UN Doc. E/2002/22, para. 513.

that special care should be taken to ensure respect for the rights of all minority groups concerning issues of national policy, such as education.[59] The effect of the Committee observations is that they confirm the various educational rights of members of minorities, as set out in the OSCE's Hague Recommendations Regarding the Education Rights of National Minorities of 1996, ranging from the protection against discrimination in education to the participation of minority communities in school governance and in the formulation of education policy, and from the right to found private schools which are recognised by the state to the right to receive education in the minority language in public schools.

The Committee has also addressed the situation of particular minority groups, facing widespread discrimination in education. It has on several occasions dealt with the educational situation of *Roma.* In its Concluding Observations on the report of Romania, the Committee stated that it was "particularly concerned" about the realisation of the right to education of Roma, who, it noted, "[continue] to suffer many forms of unofficial discrimination". The Committee recommended to the state party that it should "take vigorous steps" to ensure that the right to education was guaranteed to members of the Roma community. The Committee called upon the government of Romania to adopt an active non-discrimination policy with respect to the Roma community and to "assure proper participation in educational activities by children belonging to that group".[60]

2.2.7. *Indigenous Peoples*

The Committee has identified indigenous peoples as yet another disadvantaged group in education. Disadvantagement is reflected in the often lower

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[59] Concluding Observations of the CESCR: Poland (third periodic report), 18th Session, reproduced in UN Doc. E/1999/22, para. 157.

[60] Concluding Observations of the CESCR: Romania (second periodic report concerning the rights covered by articles 13 to 15 ICESCR), 10th Session, reproduced in UN Doc. E/1995/22, paras. 94 and 97. See also Concluding Observations of the CESCR: Slovak Republic (initial report), 29th Session, reproduced in UN Doc. E/2003/22, paras. 323 and 338 (concern about the low rate of primary school enrolment and the high drop-out rates at secondary schools among Roma children; efforts to deal with these issues should be intensified), Concluding Observations of the CESCR: Czech Republic (initial report), 28th Session, reproduced in UN Doc. E/2003/22, paras. 90 and 111 (concern about the over-representation of Roma children in so-called "special schools" which are primarily designed for mentally retarded children, resulting in substandard education; Roma children should be removed from "special schools" and integrated into the mainstream of the educational system), Concluding Observations of the CESCR: Croatia (initial report), 27th Session, reproduced in UN Doc. E/2002/22, paras. 902 and 919 (concern that Roma children may not be going to school; steps should be taken to ensure that they are able to go to school) and Concluding Observations of the CESCR: Italy (third periodic report), 22nd Session, reproduced in UN Doc. E/2001/22, paras. 116 and 129 (concern that a large number of

educational level of members of such communities. In the case of Australia, for example, the Committee specifically noted the problem of illiteracy among the adults of the Aboriginal group, "the majority of which did not have primary and secondary education".[61] In the case of New Zealand, the Committee similarly noted that the Maori people "continue to figure disproportionately in relation to . . . poor educational and technical qualifications".[62] The Committee has noticed that discrimination against indigenous peoples in education usually does not assume the form of "active", but rather of "static" discrimination. Analysing the report of Panama, the Committee thus commented that "[n]otwithstanding the absence of legal discrimination . . ., the Committee is deeply concerned about the persisting disadvantage faced in practice by members of indigenous communities in Panama, and in particular about the marked disparities in the levels of . . . literacy and access to . . . education". The Committee urged the state party "to pay particular attention to improving . . . literacy rates and access to . . . education . . . for indigenous peoples".[63] Panama was requested to provide, in its next periodic report, detailed information about "the measures taken to . . . promote equal opportunity for all in education".[64] In its Concluding Observations on the reports of Bolivia and Honduras, the Committee has further expressed its concern about the limited possibilities for indigenous populations to enjoy education in their mother tongue.[65]

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the Roma population live in camps, many Roma children having abandoned primary and secondary schooling; better education for Roma children should be provided).

[61] Concluding Observations of the CESCR: Australia (second periodic report concerning the rights covered by articles 13 to 15 ICESCR), 8th Session, reproduced in UN Doc. E/1994/23, paras. 150 and 158. See also Concluding Observations of the CESCR: Australia (third periodic report), 23rd Session, reproduced in UN Doc. E/2001/22, para. 380 (deep concern that, despite the efforts of the state party, the indigenous populations of Australia continue to be at a comparative disadvantage in the enjoyment of the right to education).

[62] Concluding Observations of the CESCR: New Zealand (initial report), 9th Session, reproduced in UN Doc. E/1994/23, paras. 192 and 195. See also Concluding Observations of the CESCR: New Zealand (second periodic report), 30th Session, reproduced in UN Doc. E/2004/22, para. 193 (concern about the persistent inequalities between the Maori and non-Maori people in access to education) and Concluding Observations of the CESCR: Peru (initial report), 16th Session, reproduced in UN Doc. E/1998/22, para. 144 (22 per cent of Quechuan-speaking persons in Peru receive no schooling at any level).

[63] Concluding Observations of the CESCR: Panama (second periodic report), 26th Session, reproduced in UN Doc. E/2002/22, paras. 450 and 466.

[64] UN Doc. E/2002/22, para. 478. See also Concluding Observations of the CESCR: Bolivia (initial report), 25th Session, reproduced in UN Doc. E/2002/22, para. 269 (marginalisation of indigenous communities, who suffer from inadequate access to basic education) and Concluding Observations of the CESCR: Honduras (initial report), 25th Session, reproduced in UN Doc. E/2002/22, para. 140 (discrimination of indigenous populations in the field of education).

[65] Concluding Observations of the CESCR: Bolivia (initial report), 25th Session, reproduced in UN Doc. E/2002/22, para. 279 and Concluding Observations of the CESCR: Honduras (initial report), 25th Session, reproduced in UN Doc. E/2002/22, para. 136. See also Concluding Observations of the CESCR: Guatemala (second periodic report), 31st

2.3. *The Aims of Education*

Article 13(1) second and third sentence ICESCR lays down the aims of education. Education must be directed to the full development of the human personality and the sense of its dignity, strengthen respect for human rights and fundamental freedoms, enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the UN for the maintenance of peace.

The CESCR has, in its Concluding Observations so far, emphasised that school curricula should include education on human rights. In its consideration of Australia's report, the Committee noted with concern that "no steps have been taken . . . to strengthen human rights education in formal and non-formal curricula".[66] The Committee called upon Australia "to take effective steps to ensure that human rights education is included in primary and secondary school curricula".[67] Considering the report of Tunisia, the Committee encouraged the state party "to endeavour to establish separate courses on human rights, particularly at the university level".[68] The

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Session, reproduced in UN Doc. E/2004/22, paras. 419 and 437 (concern about the limited access for indigenous peoples to enjoy education in their mother tongue; intercultural bilingual education should be broadened and adequate funds and human resources should be allocated in this regard), Concluding Observations of the CESCR: Suriname (initial report), 12th Session, reproduced in UN Doc. E/1996/22, paras. 163 and 170 (education only in Dutch, the official language of Suriname; no efforts made to preserve the native languages of the various indigenous groups; the native languages of indigenous groups should be preserved) and Concluding Observations of the CESCR: Mexico (second periodic report), 9th Session, reproduced in UN Doc. E/1994/23, paras. 233 and 236 (difficulties experienced by many indigenous groups in teaching their language; resources should be made available for indigenous groups to enable them to preserve their language).

[66] Concluding Observations of the CESCR: Australia (third periodic report), 23rd Session, reproduced in UN Doc. E/2001/22, para. 388.

[67] UN Doc. E/2001/22, para. 400.

[68] Concluding Observations of the CESCR: Tunisia (second periodic report), 20th Session, reproduced in UN Doc. E/2000/22, para. 180. See also Concluding Observations of the CESCR: Armenia (initial report), 21st Session, reproduced in UN Doc. E/2000/22, para. 311 (human rights education should be ensured in curricula at all levels of education), Concluding Observations of the CESCR: Luxembourg (second periodic report), 17th Session, reproduced in UN Doc. E/1998/22, paras. 399 and 407 (concern about the absence of human rights education in school curricula; such education should be included in school curricula), Concluding Observations of the CESCR: Belarus (third periodic report), 15th Session, reproduced in UN Doc. E/1997/22, para. 293 (the government should increase its efforts in relation to human rights education so as to ensure that all categories of students and teachers are covered), Concluding Observations of the CESCR: Paraguay (initial report), 14th Session, reproduced in UN Doc. E/1997/22, para. 91 (the campaign undertaken in relation to human rights education at the primary, secondary and university levels should be expanded), Concluding Observations of the CESCR: Algeria (initial report), 13th Session, reproduced in UN Doc. E/1996/22, para. 304 (human rights instruction should be included in school curricula, especially in primary schools) and Concluding Observations of the CESCR: Mauritius (initial report), 13th Session, reproduced in UN Doc. E/1996/22,

Committee has also addressed education on particular human rights. It has, for example, stressed the need for curricula to include education on matters related to the right to health. The Committee thus recommended to Poland that "sexual and reproductive health education be included in the national school curricula".[69] To the Ukraine, the Committee recommended that "the State party provide children with accurate and objective information about alcohol and tobacco use".[70] The Committee has further pointed out that it does not suffice to include "human rights education" as a separate subject as part of the curriculum. Additionally, the general learning environment in schools must be imbued with human rights values. In its Concluding Observations on the report of Georgia, the Committee noted with concern that "in the new secondary school curriculum there appears to be an imbalance between the amount of time devoted to military training (3 units) and to fundamentals of justice (1 unit)"[71] and recommended to the state party to strike an appropriate balance in this regard.[72] In the case of Japan, the Committee stated that it "is concerned about the frequently excessively competitive and stressful nature of all levels of education, which results in school absence, illness, and even suicide by students"[73] and recommended a comprehensive review of the education system in this respect.[74]

But, the Committee has also underlined the importance of the educational aim that education should promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups. Commenting on the report of Croatia, the Committee urged that the educational curricula be reviewed in order to promote mutual understanding,

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paras. 241 and 247 (concern about the absence of human rights education in all school curricula; such education should be incorporated in all school curricula).

[69] Concluding Observations of the CESCR: Poland (fourth periodic report), 29th Session, reproduced in UN Doc. E/2003/22, paras. 369 and 391. See also Concluding Observations of the CESCR: Russian Federation (fourth periodic report), 31st Session, reproduced in UN Doc. E/2004/22, paras. 476 and 504 (concern at the sharp increase in the HIV-infection rate; there should be sex education in schools to ensure that children know about the disease and how to protect themselves), Concluding Observations of the CESCR: Trinidad and Tobago (second periodic report), 28th Session, reproduced in UN Doc. E/2003/22, paras. 272 and 295 (the provision of education on sexual and reproductive health should be enhanced) and Concluding Observations of the CESCR: Mexico (third periodic report), 21st Session, reproduced in UN Doc. E/2000/22, paras. 391 and 405 (women's sexual and reproductive health rights should be included as subjects in school curricula).

[70] Concluding Observations of the CESCR: Ukraine (fourth periodic report), 26th Session, reproduced in UN Doc. E/2002/22, para. 512.

[71] Concluding Observations of the CESCR: Georgia (initial report), 22nd Session, reproduced in UN Doc. E/2001/22, para. 93.

[72] UN Doc. E/2001/22, para. 105.

[73] Concluding Observations of the CESCR: Japan (second periodic report), 26th Session, reproduced in UN Doc. E/2002/22, para. 610.

[74] UN Doc. E/2002/22, para. 637.

tolerance and friendship, and that any educational material that is discriminatory or derogatory towards others should be removed.[75]

It is rather unfortunate, however, that the other aims of education in article 13(1) second and third sentence did not feature more prominently in the Committee's examination of state reports so far. More emphasis should in particular have been placed on the educational aim of the full development of the human personality.

2.4. *Primary and Fundamental Education*

Article 13(2)(a) ICESCR requires primary education to be compulsory and available free to all.

The conclusion to be drawn from the CESCR's Concluding Observations is that the degree of urgency of realising compulsory and free primary education is considered to be high, and that it will not be easy for states parties to discharge the onus of proving that they have not complied with their duty of realising primary education because of a lack of resources. With regard to the Solomon Islands, the Committee expressed its concern about the absence of compulsory primary education, even though aware of "the lack of financial resources due to the prevailing economic crisis in Solomon Islands".[76] In the case of Kenya, the Committee observed that "the obligation of States parties to the Covenant to ensure that 'primary education shall be compulsory and available free to all' applies in all situations including those in which local communities are unable to furnish buildings, or individuals are unable to afford any costs associated with attendance at school".[77] At all times, states parties must allocate "maximum resources" with a view to achieving compulsory and free primary education. The Committee has noted, therefore, when analysing the report of Panama, that it "is concerned about the inadequacy of resources allocated to address the problems of primary . . . education".[78] When examining the report of Zimbabwe, the Committee expressed concern "about

[75] Concluding Observations of the CESCR: Croatia (initial report), 27th Session, reproduced in UN Doc. E/2002/22, para. 920. See also Concluding Observations of the CESCR: Israel (second periodic report), 30th Session, reproduced in UN Doc. E/2004/22, para. 288 (the system of mixed schools for Jewish and Arab pupils should be developed in order to promote understanding, tolerance and friendship among the citizens of the country).

[76] Concluding Observations of the CESCR: Solomon Islands (without report), 20th Session, reproduced in UN Doc. E/2000/22, para. 206.

[77] Concluding Observations of the CESCR: Kenya (without report), 8th Session, reproduced in UN Doc. E/1994/23, para. 84.

[78] Concluding Observations of the CESCR: Panama (second periodic report), 26th Session, reproduced in UN Doc. E/2002/22, para. 461.

cutbacks in education expenditure", which, in its view, "result in non-compliance with article 13, paragraph 2(a)".[79]

Primary education must be *compulsory*. The Committee has emphasised this point on a number of occasions. In the case of Aruba, the Committee noted with concern that "primary education is still not compulsory"[80] and recommended to Aruba that "a plan of action be adopted urgently to move towards the provision of free compulsory primary education as required by article 14 of the Covenant".[81] Commenting on the situation of ESCR in the Gambia, the Committee stated that it "deeply regrets the absence of compulsory education in the Gambia" and drew the attention of the government to its obligation under the Covenant to ensure that primary education is compulsory and free to all and also to its obligation under article 14 ICESCR.[82] Primary education must further be *free*. Also this point has been stressed by the Committee more than once. In the case of Colombia, the Committee noted that the constitution of that country guaranteed free public education, except for those who could afford to pay fees. It noted with concern that the imposition of fees had prevented a number of children from having access to free primary education and that their families had had to institute legal proceedings in order to obtain such access. The Committee considered this practice by the state party to be contrary to articles 13 and 14.[83] The Committee recommended to the state party that it should launch an effective campaign with a view to providing free primary education.[84] Commenting on the report of Cameroon, the Committee regretted the requirement of a parental contribution in the form of compulsory fees levied by primary schools and recommended to

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[79] Concluding Observations of the CESCR: Zimbabwe (initial report), 16th Session, reproduced in UN Doc. E/1998/22, para. 77.

[80] Concluding Observations of the CESCR: Netherlands (Aruba) (second periodic report), 18th Session, reproduced in UN Doc. E/1999/22, para. 203.

[81] UN Doc. E/1999/22, para. 207.

[82] Concluding Observations of the CESCR: Gambia (without report), 10th Session, reproduced in UN Doc. E/1995/22, para. 203. See also Concluding Observations of the CESCR: Morocco (second periodic report), 24th Session, reproduced in UN Doc. E/2001/22, paras. 543 and 566 (deep concern about the low level of primary school attendance; state party urged to ensure access to compulsory and free primary education for all), Concluding Observations of the CESCR: Saint Vincent and the Grenadines (without report), 17th Session, reproduced in UN Doc. E/1998/22, para. 435 (concern that there is no legal requirement that children attend school) and Concluding Observations of the CESCR: Mexico (second periodic report), 9th Session, reproduced in UN Doc. E/1994/23, paras. 232 and 240 (large percentage of children appear to have left school without having been able to complete their primary education; vigorous steps should be taken to ensure that primary education is compulsory and free for all).

[83] Concluding Observations of the CESCR: Colombia (fourth periodic report), 27th Session, reproduced in UN Doc. E/2002/22, para. 776.

[84] UN Doc. E/2002/22, para. 797.

the government that effective measures should be taken to end all forms of compulsory parental contribution for primary education.[85] Primary education must, finally, be compulsory and free *for all*. In its Concluding Observations on the report of the Ukraine, the Committee hence underlined that "fulfilment of the right to education involves an obligation for the Government to provide free primary education for all, including children with disabilities and children assigned to homes or institutions".[86]

Article 13(2)(d) ICESCR requires fundamental education to be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education. Surprisingly, however, in its Concluding Observations, the Committee has not often dealt with fundamental education so far.[87] In its consideration of Ireland's report, the Committee urged the state party though "to enact legislation that extends the constitutional right to free primary education to all adults with special educational needs".[88] The Committee should generally pay more attention to the performance by states parties of their obligations with regard to fundamental education.

2.5. *Secondary, and Technical and Vocational Education*

Article 13(2)(b) ICESCR requires secondary education in its different forms, including technical and vocational secondary education, to be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education.

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[85] Concluding Observations of the CESCR: Cameroon (initial report), 21st Session, reproduced in UN Doc. E/2000/22, paras. 341 and 357. See also Concluding Observations of the CESCR: Georgia (second periodic report), 29th Session, reproduced in UN Doc. E/2003/22, paras. 425 and 444 (concern that parents are faced with payments for various purposes in primary education; access to primary education free of charge should not be impeded in reality by additional material costs and by informal fees), Concluding Observations of the CESCR: Solomon Islands (initial report), 29th Session, reproduced in UN Doc. E/2003/22, paras. 462 and 476 (the cost of textbooks, stationery and teaching materials makes them unaffordable for many parents; steps should be taken to ensure that all children are able to exercise their right to free primary education), Concluding Observations of the CESCR: Nigeria (initial report), 18th Session, reproduced in UN Doc. E/1999/22, paras. 124 and 135 (regret that primary school fees have been reintroduced in certain states; the right to compulsory and free primary education should be enforced) and Concluding Observations of the CESCR: Viet Nam (initial report), 8th Session, reproduced in UN Doc. E/1994/23, para. 140 (still no programme to guarantee free primary education).

[86] Concluding Observations of the CESCR: Ukraine (third periodic report), 13th Session, reproduced in UN Doc. E/1996/22, para. 268.

[87] It has, at any rate, not done so under the designation "fundamental education".

[88] Concluding Observations of the CESCR: Ireland (second periodic report), 28th Session, reproduced in UN Doc. E/2003/22, para. 150. See also Concluding Observations of the CESCR: Republic of Korea (initial report), 12th Session, reproduced in UN Doc. E/1996/22, para. 81 (the state party should allocate resources to carry out a range of initiatives in the field of adult education for women).

The CESCR's Concluding Observations issued so far have often dealt with matters related to secondary education. With regard to the implementation of ESCR in the Gambia, for example, the Committee noted with concern that "as a result of the absence of compulsory education legislation and because of the paucity of secondary school opportunities, most children complete their formal education by the age of 14 and informally enter the work force".[89] With regard to Georgia's report, the Committee noted with concern "the high number of school drop-outs, particularly in secondary education".[90] These and other observations reflect the importance the Committee attaches to a functioning system of secondary education.

States parties are obliged to allocate "maximum resources" with a view to making secondary education progressively available and accessible. When analysing the report of Panama, the Committee noted, therefore, that it "is concerned about the inadequacy of resources allocated to address the problems of . . . secondary education"[91] and requested the state party to "take measures aimed at increasing the resources available to . . . promote . . . secondary education".[92] Similarly, when examining the report of Korea, the Committee noted that in that state party "education is free and compulsory only at the primary school level, which is not commensurate with the State party's high level of economic development".[93] The Committee recommended to the state party that it "establish a plan to strengthen the public education system . . . in accordance with the State party's high level of economic development" and that the plan should include "a reasonable timetable for specific actions for the introduction of free and compulsory secondary education".[94] Thus, where a state party's resources so allow, actual progress towards free and compulsory secondary education is expected by the Committee.

The obligations of states parties with regard to secondary education are of a progressive nature. This means that—taking account of resource constraints—progress may be gradual. It further means that retrogression must

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[89] Concluding Observations of the CESCR: Gambia (without report), 10th Session, reproduced in UN Doc. E/1995/22, para. 203.

[90] Concluding Observations of the CESCR: Georgia (second periodic report), 29th Session, reproduced in UN Doc. E/2003/22, para. 426. See also Concluding Observations of the CESCR: Iceland (second periodic report), 20th Session, reproduced in UN Doc. E/2000/22, para. 83 (concern at the high rate at which young people drop out of upper secondary education) and Concluding Observations of the CESCR: Luxembourg (second periodic report), 17th Session, reproduced in UN Doc. E/1998/22, para. 398 (concern about the high drop-out rates among youth of secondary school age).

[91] Concluding Observations of the CESCR: Panama (second periodic report), 26th Session, reproduced in UN Doc. E/2002/22, para. 461.

[92] UN Doc. E/2002/22, para. 479.

[93] Concluding Observations of the CESCR: Republic of Korea (second periodic report), 25th Session, reproduced in UN Doc. E/2002/22, para. 239.

[94] UN Doc. E/2002/22, para. 252.

be avoided. When analysing the report of Colombia, the Committee stated, accordingly, that it "is . . . concerned about the decline in the quality of secondary education"[95] and recommended to Colombia that "the Government take measures to improve the quality of secondary education".[96] Likewise, when examining the report of the Netherlands, the Committee expressed its concern at "the consequences of the Tuition Fees Act which has led to a constant increase in the cost of [secondary] education". It held that "[s]uch increases are contrary to the principle of equality of opportunities between the children of rich families and children of poor families". The Committee requested the Netherlands to "take appropriate steps to alleviate or eliminate the adverse effects of the Tuition Fees Act".[97]

The Committee's Concluding Observations have also addressed technical and vocational secondary education. With regard to Jamaica's report, the Committee stated that it "is concerned that 75 per cent of the unemployed reported that they have no recognised educational or vocational qualifications, thus diminishing their chances for employment". The Committee recommended to Jamaica that it "provide proper vocational training and education for men and women in order to enhance their employment opportunities".[98]

Other topics which the Committee has addressed in its Concluding Observations have included child labour, teenage pregnancies and early marriages and the effects of these occurrences on the child's right to education. Thus, when considering the report of El Salvador, the Committee observed that child labour was one of the factors hampering the implementation of the right to education and recommended to the state party that it should take measures to enable working children to receive an ade-

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[95] Concluding Observations of the CESCR: Colombia (third periodic report), 13th Session, reproduced in UN Doc. E/1996/22, para. 192.

[96] UN Doc. E/1996/22, para. 198.

[97] Concluding Observations of the CESCR: Netherlands (European Part of the Kingdom) (second periodic report), 18th Session, reproduced in UN Doc. E/1999/22, paras. 185 and 193. See also Concluding Observations of the CESCR: Nigeria (initial report), 18th Session, reproduced in UN Doc. E/1999/22, para. 125 (drastically increased school fees for secondary school).

[98] Concluding Observations of the CESCR: Jamaica (second periodic report), 27th Session, reproduced in UN Doc. E/2002/22, paras. 932 and 945. See also Concluding Observations of the CESCR: Solomon Islands (initial report), 29th Session, reproduced in UN Doc. E/2003/22, paras. 455 and 467 (concern at the high rate of unemployment and underemployment, especially among women and young people; vocational training should be provided, in particular to women and young people) and Concluding Observations of the CESCR: Nepal (initial report), 26th Session, reproduced in UN Doc. E/2002/22, paras. 536 and 563 (concern at the high unemployment rate and about the lack of skills-oriented education; the unemployment rate should be reduced by providing skills-oriented education).

quate education.[99] With regard to the report of Honduras, the Committee expressed its concern about "the high rate of teenage pregnancy and that those girls are deprived of the opportunity to continue their education".[100] Finally, with regard to Kyrgyzstan's report, the Committee stated that it "is concerned about the phenomenon of children dropping out of school" and that "[t]he situation of girls is particularly alarming, as their access to education is being curtailed by a revival of the tradition of early marriage, and a decrease in the prestige of having a formal education".[101]

2.6. *Higher Education*

Article 13(2)(c) ICESCR requires higher education to be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education.

With a view to making higher education progressively available and accessible, states parties are obliged to make available "maximum resources". In its consideration of the report of Korea, the CESCR noted, therefore, that in that state party "[o]nly primary education is provided free of charge", but that "given the strength of the Korean economy it appears appropriate that free education should also extend to the . . . higher [sector]". It also noted that "there is a severe problem of undersupply of places in higher education resulting in extremely competitive entry requirements".[102]

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[99] Concluding Observations of the CESCR: El Salvador (initial report), 14th Session, reproduced in UN Doc. E/1997/22, paras. 168 and 180. See also Concluding Observations of the CESCR: Mexico (third periodic report), 21st Session, reproduced in UN Doc. E/2000/22, para. 384 (regret at the state party's lack of commitment to increase the minimum working age of children from 14 to 16, since "the age of 16 is when basic education is normally concluded"), Concluding Observations of the CESCR: Tunisia (second periodic report), 20th Session, reproduced in UN Doc. E/2000/22, para. 169 (concern about the discrepancy between the age fixed in law for the completion of mandatory education, which is 16 years, and the minimum age for employment, which has been set at 15 years for the manufacturing sector and 13 years for the agricultural sector) and Concluding Observations of the CESCR: Morocco (initial report), 10th Session, reproduced in UN Doc. E/1995/22, paras. 116 and 123 (concern at the incidence of child labour; measures should be taken to ensure that working children effectively enjoy their right to an education).

[100] Concluding Observations of the CESCR: Honduras (initial report), 25th Session, reproduced in UN Doc. E/2002/22, para. 134.

[101] Concluding Observations of the CESCR: Kyrgyzstan (initial report), 23rd Session, reproduced in UN Doc. E/2001/22, para. 351. See also Concluding Observations of the CESCR: Sri Lanka (initial report), 18th Session, reproduced in UN Doc. E/1999/22, para. 73 (girls as young as 12 years of age are able to marry under customary law, as long as the parents consent; the practice of early marriage has negative impacts on the right to education of the girl child).

[102] Concluding Observations of the CESCR: Republic of Korea (initial report), 12th Session, reproduced in UN Doc. E/1996/22, para. 76.

The Committee recommended to the state party that "immediate attention be given . . . to enhancing the access . . . to . . . higher education, as well as to the need for an expanded higher education sector".[103] Consequently, the Committee expects progress in the development of the higher education sector where a state party has the required resources at its disposal.

The accessibility of higher education is to be promoted "in particular by the progressive introduction of free education". This means that the introduction or increase of study fees in higher education is definitely not legitimate. This has also been stressed by the Committee. The Committee has thus stated that the reintroduction of fees at the tertiary level of education constitutes "a deliberate retrogressive step".[104] Similarly, it has indicated that the introduction of tuition fees and student loans in higher education is "inconsistent with article 13, paragraph 2(c), of the Covenant".[105] Commenting on the report of Germany, the Committee expressed its concern that "several *Länder* have abandoned the principle of free higher education by requiring the payment of fees, which in some cases are allocated to cover administrative costs of the *Länder*, and not university expenditure". The Committee recommended to Germany that its "Federal Government introduce a reduction of tuition fees in the national framework legislation regulating higher education, with a view to abolishing them".[106]

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[103] UN Doc. E/1996/22, para. 84.

[104] Concluding Observations of the CESCR: Mauritius (without report), 10th Session, reproduced in UN Doc. E/1995/22, para. 181.

[105] Concluding Observations of the CESCR: United Kingdom of Great Britain and Northern Ireland, the Crown Dependencies and the Overseas Dependent Territories (fourth periodic reports), 28th Session, reproduced in UN Doc. E/2003/22, para. 225.

[106] Concluding Observations of the CESCR: Germany (fourth periodic report), 26th Session, reproduced in UN Doc. E/2002/22, paras. 671 and 689. See also Concluding Observations of the CESCR: Luxembourg (third periodic report), 30th Session, reproduced in UN Doc. E/2004/22, para. 103 (education at the Université de Luxembourg—a national university about to be established—should be free from the outset or tuition fees should be kept at a minimum level with a view to introducing progressively free higher education), Concluding Observations of the CESCR: Bulgaria (third periodic report), 21st Session, reproduced in UN Doc. E/2000/22, paras. 233 and 245 (concern that the fees introduced in higher education may represent a serious obstacle for disadvantaged groups seeking such an education; steps should be taken to improve access to higher education for all), Concluding Observations of the CESCR: Canada (third periodic report), 19th Session, reproduced in UN Doc. E/1999/22, paras. 414 and 424 (concern that tuition fees for university education have dramatically increased, making it very difficult for those in need to attend university; the financial obstacles to higher education for low-income students should be addressed), Concluding Observations of the CESCR: Germany (third periodic report), 19th Session, reproduced in UN Doc. E/1999/22, paras. 321 and 336 (concern that tuition fees for university education are increasing; increases in university tuition fees should be avoided) and Concluding Observations of the CESCR: Nigeria (initial report), 18th Session, reproduced in UN Doc. E/1999/22, para. 126 (university fees increased dramatically in 1997).

2.7. *A System of Schools, a Fellowship System and Teaching Staff*

Article 13(2)(e) ICESCR obliges states parties to actively pursue the development of a system of schools at all levels, to establish an adequate fellowship system, and to continuously improve the material conditions of teaching staff.

The obligation to pursue the development of a system of schools at all levels entails an injunction to states parties to allocate "maximum resources" towards ensuring that schools are provided at all levels, that school buildings are kept in good repair, that there are teaching materials and equipment of a high quality in schools, and that sufficient properly qualified teachers are available. In its analysis of the situation of ESCR in the Congo, the CESCR thus stated that it "is profoundly dissatisfied with the education system in the Congo", that "[a]lthough the Congo used to have quite a developed education system, that has seriously deteriorated as a result of economic mismanagement, the shortage of resources and political unrest" and that "there are fewer children enrolling in school, a shortage of teachers and teaching materials, and the school buildings are in a deplorable state".[107] In view of these facts, the Committee urged the Congo "to pay due attention to the rehabilitation of the educational infrastructure by allocating the necessary funds" to this end.[108] In its examination of the report of Tunisia, the Committee noted the serious problem of school drop-out in that state party and recommended to Tunisia that it should deal with the matter by addressing the problem areas of "inadequacy of pedagogical tools, excessive numbers of students per class and per teacher, lack of interest on the part of parents in sending their children to school and distance between school and home".[109]

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[107] Concluding Observations of the CESCR: Republic of the Congo (without report), 22nd Session, reproduced in UN Doc. E/2001/22, para. 208.

[108] UN Doc. E/2001/22, para. 214.

[109] Concluding Observations of the CESCR: Tunisia (second periodic report), 20th Session, reproduced in UN Doc. E/2000/22, paras. 169 and 180. See also Concluding Observations of the CESCR: Ukraine (fourth periodic report), 26th Session, reproduced in UN Doc. E/2002/22, paras. 498 and 513 (concern that the budget allocated to education has fallen sharply and concern about obsolete teaching materials and equipment in schools and colleges; the required resources should be allocated to improve the situation of education), Concluding Observations of the CESCR: Cameroon (initial report), 21st Session, reproduced in UN Doc. E/2000/22, paras. 342 and 357 (concern about the lack of school buildings and other infrastructure and of services; increased resources should be allocated to education for infrastructure and human resources), Concluding Observations of the CESCR: Nigeria (initial report), 18th Session, reproduced in UN Doc. E/1999/22, para. 125 (no desks and chairs in schools), Concluding Observations of the CESCR: Russian Federation (third periodic report), 16th Session, reproduced in UN Doc. E/1998/22, paras. 115 and 129 (concern at the deterioration of the educational system and its effects on school achievement levels and on attendance and drop-out rates; the educational system should be reinforced, the school drop-out rate be reduced and the protection of children be enhanced)

The obligation to establish an adequate fellowship system expects of states parties that they create study bursary or low-interest credit facility schemes benefiting students from families which earn a low income, to enable them to pursue post-compulsory education, without direct or indirect educational costs preventing them from doing so. With regard to the report of Bulgaria, the Committee noted, therefore, with concern that "the fees introduced in higher education may represent a serious obstacle for disadvantaged groups of society seeking such an education"[110] and requested the state party "to improve access to higher education for all . . . [by] . . . the introduction of an effective fellowship system".[111] With regard to the report of Canada, the Committee expressed its concern at "the significant increase in the average student debt on graduation".[112] The Committee urged the state party "to develop and expand adequate programmes to address the financial obstacles to post-secondary education".[113]

The obligation to improve the material conditions of teaching staff entails various state obligations. States parties must assure to teachers satisfactory working conditions, to enable them to fully devote their time and energy to teaching their students. In its analysis of the report of Uruguay, the Committee was, accordingly, "greatly concerned" "by the conflictual nature of relations between teachers and the State and by the apparent ineffectiveness of the measures taken to remedy that situation".[114] Tensions between teachers and the state have a detrimental effect on the attention of teachers to their school work. Teachers must further earn a salary which is commensurate with their status. In its consideration of the report of Bulgaria, the Committee stated that it "is . . . concerned about the low wages of teachers in Bulgaria". The Committee requested Bulgaria "to ensure that all teaching staff enjoy the conditions, including wages, commensurate with their status".[115] Teachers must, finally, be held to be entitled to take strike

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and Concluding Observations of the CESCR: Gambia (without report), 10th Session, reproduced in UN Doc. E/1995/22, para. 208 (concern that primary schools are overcrowded and that the government is not willing to increase the education budget in order to deal with the serious shortage of teachers).

[110] Concluding Observations of the CESCR: Bulgaria (third periodic report), 21st Session, reproduced in UN Doc. E/2000/22, para. 233.

[111] UN Doc. E/2000/22, para. 245.

[112] Concluding Observations of the CESCR: Canada (third periodic report), 19th Session, reproduced in UN Doc. E/1999/22, para. 414.

[113] UN Doc. E/1999/22, para. 424.

[114] Concluding Observations of the CESCR: Uruguay (initial report), 10th Session, reproduced in UN Doc. E/1995/22, para. 76. See also Concluding Observations of the CESCR: Colombia (third periodic report), 13th Session, reproduced in UN Doc. E/1996/22, paras. 192 and 198 (concern about the work situation of teachers; the material conditions of teaching staff should be improved).

[115] Concluding Observations of the CESCR: Bulgaria (third periodic report), 21st Session, reproduced in UN Doc. E/2000/22, paras. 232 and 244. See also Concluding Observations

action in support of their industrial demands, seeing that they do not fall within the definition of essential services or public servants acting on behalf of the public authorities. In its examination of the report of Zimbabwe, the Committee regretted that pursuant to the constitution of that country, teachers could not join unions and organise strikes. The Committee recommended to the state party that "a constitutional reform be undertaken to allow . . . teachers . . . to organise in unions . . . and to enable them to bargain collectively and to strike".[116]

2.8. *Parental Rights and Private Schools*

Article 13(3) ICESCR protects the right of parents to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the state. The CESCR has, in its Concluding Observations issued so far, not addressed this right of parents to a noteworthy extent.

Article 13(3) further protects the right of parents to ensure the religious and moral education of their children in conformity with their own convictions. This right has also not been dealt with extensively by the Committee. The Committee has, though, in its observations on the report of the Ukraine, recommended to the state party that it should "promote the participation of parents . . . in school governance in order to improve enrolment rates and monitor the quality of education".[117] This recommendation, however, emphasises the role of parents not in the context of their right to ensure the religious and moral education of their children, but rather for the purpose of securing their "assistance" to the state in fulfilling its duty to realise the social aspect of the right to education.

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of the CESCR: Ukraine (fourth periodic report), 26th Session, reproduced in UN Doc. E/2002/22, para. 498 (concern about the low levels of remuneration for teachers) and Concluding Observations of the CESCR: Cameroon (initial report), 21st Session, reproduced in UN Doc. E/2000/22, paras. 342 and 357 (concern about the inadequate salaries earned by teachers; increased resources should be allocated to education for human resources).

[116] Concluding Observations of the CESCR: Zimbabwe (initial report), 16th Session, reproduced in UN Doc. E/1998/22, paras. 74 and 83. See also Concluding Observations of the CESCR: Jordan (second periodic report), 23rd Session, reproduced in UN Doc. E/2001/22, paras. 240 and 254 (concern at extent of restrictions imposed on the right of public-sector employees working in educational services to participate in trade union activities; the right of trade unions to function freely may only be subject to narrow restrictions) and Concluding Observations of the CESCR: Denmark (third periodic report), 20th Session, reproduced in UN Doc. E/2000/22, paras. 110 and 118 (concern at restrictions on the right to strike of teachers in the public sector; the right to strike should be assured to teachers in the public sector, since they do not constitute an essential service).

[117] Concluding Observations of the CESCR: Ukraine (fourth periodic report), 26th Session, reproduced in UN Doc. E/2002/22, para. 513.

Article 13(4) ICESCR protects the right of individuals and bodies to establish and direct educational institutions, subject to the observance of the aims of education in article 13(1) and to the requirement that the education given in such institutions must conform to such minimum standards as may be laid down by the state. In its analysis of the report of Sweden, the Committee stressed the former proviso. It urged Sweden "to ensure that education in independent schools, including those that have been established in the form of private companies with shareholders, is in full conformity with article 13 of the Covenant, in particular paragraph 1, on educational aims and objectives".[118] The Committee has further reminded Italy, with regard to the public funding of private schools, that "any such funding must be without discrimination on any of the prohibited grounds".[119] For the rest, the Committee has not studied the compliance of states parties with their duty to guarantee the right to found private schools more closely.

The Committee did, however, comment on the relationship between public and private education. It has been stated above that states parties may, if they so wish, establish an education system which relies extensively on the educational services of private suppliers. It has, however, also been said that the dissociation from, or the neglect of, public education by states parties is not consistent with international human rights law.[120] Tendencies of this nature have thus been criticised by the Committee. In its Concluding Observations on the report of Korea, the Committee noted with concern that "the low quality of education in public schools is compelling families to supplement the education of their children with private instruction, thereby placing an undue financial burden on families, especially those in lower-income groups". It further noted with concern "the predominance of private institutions in higher education, a fact detrimental to the lower income groups". The Committee hence recommended to Korea that it "establish a plan to strengthen the public education system . . . in accordance with the State party's high level of economic development", and that the plan should include "a re-examination of the functions and quality of the public education system relative to private education, with a view to strengthening the former and easing the burden on low-income groups imposed by the latter".[121]

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[118] Concluding Observations of the CESCR: Sweden (fourth periodic report), 27th Session, reproduced in UN Doc. E/2002/22, para. 744.

[119] Concluding Observations of the CESCR: Italy (third periodic report), 22nd Session, reproduced in UN Doc. E/2001/22, para. 141.

[120] See 10.4.1.1.1. *supra.*

[121] Concluding Observations of the CESCR: Republic of Korea (second periodic report), 25th Session, reproduced in UN Doc. E/2002/22, paras. 237, 238 and 252. See also

In sum, it is rather peculiar that the Committee has remained largely silent on the performance of states parties as regards the freedom aspect of the right to education.[122] Perhaps the Committee considers that this aspect can be dealt with more appropriately by the Human Rights Committee under the individual petition procedure of the ICCPR, in terms of which the possibility exists of submitting a communication, claiming a violation of article 18(4) ICCPR, to that body.[123] It is submitted, however, that the bias of the Committee in favour of the social aspect of the right to education is unfortunate. The dangers of such an approach have been referred to above.[124] After all, a developed education system may well be abused by a state party to promote dangerous ideologies, if the freedom dimension is not sufficiently protected. The Committee should spell out to states parties in no uncertain terms that all forms of state monopoly in education and interference with the rights of parents and the right to found private schools clearly violate article 13(3) and (4).

2.9. *Other Matters*

In its Concluding Observations up to now, the CESCR has also scrutinised the performance of states parties with regard to certain duties not expressly laid down in article 13 ICESCR.

The Committee has, for example, made observations on matters related to *academic freedom and institutional autonomy*. In the case of Tunisia, the Committee stated that "it is . . . seriously concerned that the police presence on university campuses may infringe on the freedoms necessary for academic and cultural expression".[125] Similarly, in the case of the Iran, the Committee noted with concern the "[r]estriction of freedom of debate and choice in the university institutions".[126] And, in the case of Nigeria, the

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Concluding Observations of the CESCR: Australia (third periodic report), 23rd Session, reproduced in UN Doc. E/2001/22, para. 388 (the state party has not provided sufficient information on the difference in quality of schooling available to students in public and private schools) and Concluding Observations of the CESCR: Australia (second periodic report concerning the rights covered by articles 13 to 15 ICESCR), 8th Session, reproduced in UN Doc. E/1994/23, paras. 152 and 161 (concern about the effects of funding accorded to non-government schools on the quality of education in government schools; information should be provided on any differences identified in the quality of education between government and non-governmental schools).

[122] Note should, however, be taken of the CESCR's comments on academic freedom and institutional autonomy. See 11.2.9. *infra.*

[123] See 10.5.1.5. and 10.5.2.3. *supra.*

[124] See 2.8. *supra.*

[125] Concluding Observations of the CESCR: Tunisia (second periodic report), 20th Session, reproduced in UN Doc. E/2000/22, para. 170.

[126] Concluding Observations of the CESCR: Islamic Republic of Iran (initial report), 8th Session, reproduced in UN Doc. E/1994/23, para. 126.

Committee expressed its concern that "[t]he military authorities have found . . . university professors and university students to be easy targets for repression or persecution on the pretext that they constitute the most vociferous and dangerous political opposition", that "[o]ne of the major university campuses has been put under military guardianship", that "[u]niversities have suffered repeated and long periods of closure" and that "[t]here is also a brain drain in academia, as a result of political and academic instability".[127] All these comments go to show that the Committee stresses the importance of members of the academic community being able to freely pursue, develop and transmit knowledge and ideas, and that institutions of higher education should as far as possible be free to govern their affairs without undue state interference.

The Committee has also made observations on *corporal punishment* in schools. With regard to the report of the United Kingdom, the Committee stated that it "is alarmed by the fact that corporal punishment continues to be practised in schools which are privately financed, and at the statement by the delegation that the Government does not intend to eliminate this practice".[128] The Committee recommended to the state party that it should "take appropriate measures to eliminate corporal punishment in those schools in which the practice is still permitted, *i.e.* privately financed schools".[129] This means that the Committee rejects corporal punishment as an acceptable form of administering school discipline in public and in private schools.

3. *By Way of Comparison: The Concluding Observations of the Committee on the Rights of the Child*

Finally, and by way of comparison, a few comments will now be made on the Concluding Observations of the Committee on the Rights of the Child, in as far as they address the right to education in articles 28 and 29 CRC. In a discussion of article 13 ICESCR, an examination of the Concluding Observations of the ComRC, similar to that undertaken above of the Concluding Observations of the CESCR, would have been a useful exercise, as articles 28 and 29 CRC resemble article 13 in many ways, and because the ComRC's Concluding Observations contribute to norm

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[127] Concluding Observations of the CESCR: Nigeria (initial report), 18th Session, reproduced in UN Doc. E/1999/22, para. 127.

[128] Concluding Observations of the CESCR: United Kingdom of Great Britain and Northern Ireland (third periodic report), 17th Session, reproduced in UN Doc. E/1998/22, para. 299.

[129] UN Doc. E/1998/22, para. 311.

clarification in a similar way as the CESCR's Concluding Observations. Unfortunately, however, the available space only allows for some general comments to be made. For the purposes of the overview, the Concluding Observations from the third session (January 1993)[130] until the thirty-fourth session (September/October 2003) have been considered.

Like the CESCR, the ComRC has stressed the duty of states parties to take steps to the maximum extent of their available resources to achieve the realisation of the right to education (articles 28 and 29 CRC read with article 4 CRC). The duty has, for example, been emphasised with regard to states parties obliged to comply with the terms of Structural Adjustment Programmes. In its Concluding Observations on Peru's report, the ComRC expressed its concern at the fact that the stringent budgetary measures under the Structural Adjustment Programme in that state party disadvantaged vulnerable groups of children in their access to adequate educational facilities. The Committee thus urged Peru "to take all the necessary steps to minimise the negative impact of the structural adjustment policies on the situation of children" and stated that "[t]he authorities should, in the light of articles 3 and 4 of the Convention, undertake all appropriate measures to the maximum extent of their available resources to ensure that sufficient resources are allocated to children".[131]

Like the CESCR, the ComRC has also stressed the duty of states parties to guarantee the exercise of the right to education without discrimination on certain grounds (articles 28 and 29 CRC read with article 2 CRC). With regard to Bolivia's report, the ComRC, noting with concern the disparities in the status and treatment of children in their access to adequate educational facilities, stated that "the principle of non-discrimination . . . must be vigorously applied, and that a more active approach should be taken to eliminate discrimination against certain groups of children".[132] Facilitated by provisions of the CRC on specific vulnerable groups of children, the Committee has closely examined the educational position of refugee children (article 22 CRC), disabled children (article 23), minority and indigenous children (article 30), children performing child labour (article 32) and detained children (article 40).

The ComRC has further emphasised the duty of states parties to respect the right of the child to express his views in school life, consistent with his evolving capacities (articles 28 and 29 CRC read with article 12 CRC).

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[130] The ComRC adopted its first Concluding Observations during the third session.

[131] Concluding Observations of the ComRC: Peru (initial report), 4th Session, reproduced in UN Doc. CRC/C/20 (1993), paras. 64 and 73.

[132] Concluding Observations of the ComRC: Bolivia (initial report), 3rd Session, reproduced in UN Doc. CRC/C/16 (1993), paras. 36 and 41.

With regard to Qatar, the ComRC noted that "traditional attitudes towards children in society may limit the respect for their views, especially within . . . schools" and recommended to the state party that it "[c]ontinue to promote and facilitate within . . . the school . . . respect for the views of children and their participation in all matters affecting them" and "[d]evelop skills-training programmes in community settings for . . . teachers . . . so that they can learn how to help children to express their informed views and opinions and to take those views into consideration".[133] With regard to the Isle of Man, the Committee noted that although "students may, through their parents, discuss with the school principal any concerns regarding violations of their rights, the Committee is concerned that insufficient effort has been made to establish a formal complaints procedure for students whose rights have been violated" and encouraged the state party "to establish a complaints procedure within the school system for students, at all levels, whose rights have been violated".[134]

Like the CESCR, the ComRC has analysed state performance with regard to the right to education as such (articles 28 and 29 CRC). In this regard, the Committee has focused on the aims of education (article 29(1) CRC), primary education (article 28(1)(a)), secondary education (article 28(1)(b)) and, generally, the development of the educational infrastructure. Like the approach of the CESCR, the ComRC's approach is regrettably biased in favour of the social aspect of the right to education. There are only few references to the rights of parents or the right to found private schools. Concerning the duty of states parties to provide compulsory and free primary education, it has been held that "the CESCR seems to take a rather strict approach" and that "[t]his is in contrast to the [ComRC's] more 'soft' approach", that "this Committee only expresses (deep) concern about inadequate or insufficient measures taken by governments to improve the educational situation".[135] Concerning the aims of education, the ComRC has used these, to a far greater extent than the CESCR, as a point of departure, to formulate requirements in respect of the content of education. When addressing Uzbekistan's report, the ComRC recommended to the state party that it "[r]evise the school curricula to reflect a child-centred, active-learning approach".[136] As regards the report of the United Arab

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[133] Concluding Observations of the ComRC: Qatar (initial report), 28th Session, reproduced in UN Doc. CRC/C/111 (2001), paras. 302 and 303.

[134] Concluding Observations of the ComRC: United Kingdom of Great Britain and Northern Ireland: Isle of Man (initial report), 25th Session, reproduced in UN Doc. CRC/C/100 (2000), paras. 198 and 199.

[135] Coomans, 1998b, p. 145.

[136] Concluding Observations of the ComRC: Uzbekistan (initial report), 28th Session, reproduced in UN Doc. CRC/C/111 (2001), para. 581.

Emirates, the Committee noted with concern that "[t]he system of public education continues to emphasise rote learning rather than analytical skills development" and recommended to the state party that it "[u]ndertake a process of curriculum and teaching methodology reform . . . which stresses the importance of critical thinking and problem-solving skills development".[137] As regards Grenada's report, the Committee expressed concern at "the tendency towards the use of teaching methods that are almost exclusively examination oriented" and recommended to the state party that it "review its educational programme with a view to . . . ensuring that students are taught an adequate mix of academic subjects and life skills, including communication, decision-making and conflict-resolution skills".[138]

It should, finally, be pointed out that the ComRC has dealt with certain aspects concerning the right to education not addressed, or not addressed with the same emphasis, by the CESCR. These include corporal punishment in schools,[139] violence in the school environment,[140] the exclusion of pregnant girls from school[141] and the establishment of a pre-school education system.[142]

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[137] Concluding Observations of the ComRC: United Arab Emirates (initial report), 30th Session, reproduced in UN Doc. CRC/C/118 (2002), paras. 404 and 405.

[138] Concluding Observations of the ComRC: Grenada (initial report), 23rd Session, reproduced in UN Doc. CRC/C/94 (2000), para. 408.

[139] See, *e.g.*, Concluding Observations of the ComRC: Cameroon (initial report), 28th Session, reproduced in UN Doc. CRC/C/111 (2001), para. 380 (ban of corporal punishment in schools should be monitored and enforced).

[140] See, *e.g.*, Concluding Observations of the ComRC: Monaco (initial report), 27th Session, reproduced in UN Doc. CRC/C/108 (2001), paras. 523 and 524 (concern at the prevalence of violence in schools; measures to prevent and end violence should be implemented).

[141] See, *e.g.*, Concluding Observations of the ComRC: Lesotho (initial report), 26th Session, reproduced in UN Doc. CRC/C/103 (2001), paras. 363 and 364 (deep concern that pregnant girls are often excluded from school; such action is discriminatory and violates the right to education; it should be ensured that pregnant girls are permitted to continue attending school).

[142] See, *e.g.*, Concluding Observations of the ComRC: Sri Lanka (initial report), 9th Session, reproduced in UN Doc. CRC/C/43 (1995), paras. 155 and 173 (concern at the insufficiency of pre-school establishments, managed by NGOs and not under state responsibility; the state should take under its responsibility the establishment and management of pre-school facilities).

CHAPTER TWELVE

STRENGTHENING EDUCATION AS A HUMAN RIGHT, AND IMPROVING THE SUPERVISION OF ARTICLE 13 OF THE ICESCR UNDER THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

1. *Introduction*

This final Chapter will focus on two related issues: Firstly, it will demonstrate that education needs to be strengthened as a human right. Secondly, it will make suggestions on how to improve the supervision of article 13 ICESCR under the ICESCR.

Improvements in the supervision of the ICESCR must coincide with a strengthening of education as a human right. Improving the supervision of the ICESCR alone does not suffice to convince states to realise the right to education. The first part of the discussion will address this matter. On the one hand, the discussion will stress that the currently dominant ideology, in terms of which education merely serves a human capital-producing function, must clearly be renounced. It will also emphasise that education must not merely be seen as a commodity which may be traded against a price, in other words, that the principle of free trade should not generally extend to education services. On the other hand, the discussion will argue that education must be strengthened as a human right by recognising that the right to education covers not only internal, but also external state obligations. This has a bearing on the conduct of states concerning the granting of bilateral assistance to education, and on their conduct within the framework of intergovernmental organisations, to the extent that these are engaged in providing multilateral assistance to education. The implications of the right to education for both bilateral and multilateral assistance to education will be dealt with. Regarding intergovernmental organisations, attention will specifically be given to the responsibility of states for ensuring that the policies of the World Bank duly respect the right to education.

The second part of the discussion then suggests improvements in the supervision of article 13 ICESCR under the ICESCR. It will be argued that the system of state reports has distinct strengths and should, therefore, be retained. It must, however, be sought to enhance the effectiveness of the system, by improving the quality of state reports, by developing the

use of indicators by the CESCR, and by encouraging the active participation of UNESCO and other UN organs and Specialised Agencies in the supervisory system. But, it will also be argued that there are limits to the system of state reports. It will be shown that the limits involved may be effectively addressed by adopting an Optional Protocol to the ICESCR, providing for individual and group complaints in relation to the rights of the ICESCR, including article 13, to be considered by the CESCR. When deciding such complaints, a "violations approach" to ESCR needs to be adopted. The meaning of a "violation" of an ESCR will be clarified, and an attempt will be made to identify "violations" of the right to education—particularly, in the form of a failure to comply with the core content of the right to education.

It should, finally, be noted that the suggestions on how to improve the supervision of article 13 ICESCR under the ICESCR are applicable *mutatis mutandis* to the supervision of articles 28 and 29 CRC under the CRC. This is true for the suggestions related to enhancing the effectiveness of the system of state reports, and for those related to adopting an Optional Protocol, providing for individual and group complaints.

2. *Strengthening Education as a Human Right*

It has been observed that "[t]he definition of education as a human right does not guide many international or domestic education strategies; the recent emergence of a focus on education as a means for creating human capital and the prospect of education being purchased and sold as service create a great challenge for reaffirming education as a human right and as a public good".[1] Another challenge for education as a human right is that a commitment to the right to education is often lacking where states act at the global level in a bilateral or multilateral context. The bilateral assistance community and intergovernmental organisations, such as the World Bank, are often not convincingly committed to incorporating a human rights perspective into their development policies. This may constrain the ability of individual states to guarantee the right to education. For this reason, states should accept that the right to education also entails external states obligations. The following section addresses these issues.

[1] Tomaševski, 2000a, para. 66 (UN Doc. E/CN.4/2000/6).

2.1. *Renouncing the Human Capital Approach to Education*

In the context of formulating national and international education strategies, education is often not defined as a human right, but rather as a means for creating "human capital". "Human capital" refers to persons belonging to the working-age population who possess economically relevant attributes (knowledge, skills and competence). The purpose of education is thus said to be structuring the supply of qualified people over a long period in accordance with economic demands. The human capital approach to education focuses on the economic value of education, the rate of return on schooling and the productive utility of human knowledge.[2]

Although it cannot be denied that education must also prepare persons to contribute their share to economic progress—not least because the implementation of human rights depends upon such progress—this cannot be seen as the sole nor, in fact, as the most important function of education. Such a view of education may be described as reductive, as it depletes education of much of its purpose and substance. Education should not be moulded solely towards economically relevant knowledge. It should also prepare students for parenthood and political participation and enhance social cohesion and tolerance. It must be aimed at the full development of the human personality and at strengthening respect for human rights.[3] The human capital approach turns upside-down the idea that the economy should serve people, rather than the other way round. This amounts to questioning man's inherent dignity.[4] The human capital approach implies, for example, that disabled children may be excluded from school, because their learning does not yield a sufficient return on investment.[5]

For these reasons, the human capital approach to education should be renounced and, as emphasised by Katarina Tomaševski, former Special Rapporteur of the Commission on Human Rights on the Right to Education, "an appropriate human rights response to the notion of human capital ought to be forged".[6]

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[2] The human capital approach is advocated, for example, by Mingat, A., "The strategy used by high-performing Asian economies in education: Some lessons for developing countries", in: *World Development*, Vol. 26, No. 4, 1998, p. 697 and p. 700.

[3] See Tomaševski, 2000a, paras. 67–68 (UN Doc. E/CN.4/2000/6).

[4] See *ibidem* at para. 67. See also Tomaševski, 2003a, para. 33 (UN Doc. E/CN.4/2003/9).

[5] See Tomaševski, 2001f, p. 38.

[6] Tomaševski, 2000a, para. 67 (UN Doc. E/CN.4/2000/6). For a similar view, see Sen, A., "Human development and financial conservatism", in: *World Development*, Vol. 26, No. 4, 1998, p. 734.

2.2. *The Dangers of Free Trade in Education Services*

In line with today's dominant market ideology, the practice of selling and purchasing education is gaining ground.

Reference may be made to a paper presented at the Day of General Discussion on the right to education, held by the CESCR on 30 November 1998.[7] Georg Kent argues in his paper[8] that the right to education should not be viewed as something that obligates governments to provide education for all—just as the right to food does not mean that governments are obliged to feed all of us:

> Imagine what our meals would be like if we all depended on Government to feed us. We would probably all get some sort of uniform watery gruel, something akin to prison fare. It is just that sort of thing that happens when we depend on Government to educate us.[9]

The author thus develops an argument in favour of education as a private investment. He considers that, particularly in developing countries, private vocational schools should be created, which are organised in a business-like manner.[10] The curricula should be designed to build skills that enhance long-term earning capacity in the local setting. Tuition should be paid through loans against future earnings.[11] Kent's ideas are based on the assumption that state education is necessarily of poor quality. This will, however, only be the case if states do not invest sufficient money in their education systems, and if they do not assure that such money is put to good use.[12] One must, therefore, support the consensus reached at the Day of General Discussion that

> the new design for primary education as a private investment proposed by Mr. Kent . . . could be detrimental to the rights protected under the Covenant and should only be seen as an additional means of financing education, beyond the threshold of free primary education to be provided by the State.[13]

A large-scale withdrawal of the state from the education sector and free trade in education services are problematic from the perspective of human rights. With fewer state funds available to public education, the quality thereof would be in jeopardy. Public schools would have to make up for

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[7] On the Day of General Discussion on the right to education, see 8.5.1. *supra.*

[8] See Kent, 1998 (UN Doc. E/C.12/1998/13).

[9] *Ibidem* at para. 5.

[10] See *ibidem* at para. 16.

[11] See *ibidem* at para. 19.

[12] Reporting on the Day of General Discussion in the Report on the Eighteenth and Nineteenth Sessions, contained in UN Doc. E/1999/22, the CESCR states at para. 512 that experience so far attested to the good quality of state education in most countries.

[13] UN Doc. E/1999/22, para. 512.

financial shortfalls by procuring funding from the private sector and also by charging fees. In the end, all schools would be financially dependent upon the industry. The latter would require education to be moulded towards economically relevant knowledge. Schools would thus be forced to serve the interests of the industry rather than those of society at large. Further, because all schools would be charging fees, the principle that primary education must be free and secondary and tertiary education be made progressively free would be subverted, hence excluding the poor from education.

Katarina Tomaševski, former Special Rapporteur of the Commission on Human Rights on the Right to Education, has expressed the fear that "education will be moved from international human rights law to international trade law".[14] The General Agreement on Trade in Services (GATS) is aimed at promoting free international trade in services. It seeks to achieve this through negotiations under the GATS, conducted on the basis that individual members of the World Trade Organisation (WTO) will commit to opening their markets in certain service sectors. The GATS also covers the sector "educational services".[15] Negotiations envisage WTO members making essentially two commitments regarding the education sector. The first is a market access commitment, in terms of which a member agrees, with regard to the services and service suppliers of any other member, not to impose limitations concerning the number of suppliers, the value of transactions, the number of operations, the number of natural persons that may be employed, the specific types of legal entity and the participation of foreign capital.[16] The second is a national treatment commitment, obliging a member to accord to services and service suppliers of any other member, with regard to all measures affecting the supply of services, treatment no less favourable than that which it accords to its own like services and service suppliers, so as to realise equal conditions of competition for local and foreign services and service suppliers.[17] WTO members may make

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[14] Tomaševski, 2001f, p. 22. The former Special Rapporteur deals with the dangers of free trade in education services in Tomaševski, 2000a, paras. 70–71 (UN Doc. E/CN.4/2000/6), Tomaševski, 2001a, paras. 55–59 (UN Doc. E/CN.4/2001/52), Tomaševski, 2002a, paras. 19–21 (UN Doc. E/CN.4/2002/60), Tomaševski, 2003a, paras. 18–19 (UN Doc. E/CN.4/2003/9) and Tomaševski, 2004a, paras. 11–18 (UN Doc. E/CN.4/2004/45).

[15] Concerning education services under the GATS, see World Trade Organisation, *Overview of Developments in the International Trade Environment: Annual Report by the Director-General*, Geneva: World Trade Organisation, 2001, pp. 79–83, paras. 38–60. For a critical assessment of the inclusion of education services in the GATS, see the Study, entitled *Whither Education?: Human Rights Law Versus Trade Law*, prepared by the Right to Education Project (public access human rights resource), available on the website of the Project at www.right-to-education.org.

[16] See art. XVI GATS.

[17] See art. XVII GATS.

partial commitments. Regarding "educational services", commitments may be entered separately in respect of each of five subsectors of education: "primary education", "secondary education", "higher education", "adult education" and "other education services".[18]

The question is whether the GATS also covers public education, for this would entail serious consequences for the right to education, in terms of which states must finance a system of public schools. If the GATS does, in fact, cover public education, state financing of public schools would have to be seen to restrain competition and thus to violate the principle of equal treatment under the GATS. To avoid any such violation, states would, therefore, largely have to withdraw from the education sector. The GATS *prima facie* seems to exclude public education. Article I(3)(b) GATS states that "'services' includes any service in any sector except services supplied in the exercise of governmental authority" and article I(3)(c) states further that "'a service supplied in the exercise of governmental authority' means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers". It might, however, well be argued that, because many states charge fees for public education (often in contravention of human rights law), such education is provided on a "commercial basis". Similarly, it might be argued that "free" public education is offered "in competition with" private "for fee" education.[19] But, even if the GATS does not cover public education, free trade in education services is generally not desirable concerning compulsory education, particularly in as far as developing countries are concerned. Increasing the number of private schools at the compulsory education level will present complex problems for these countries, in which public compulsory education is often neither available for all nor free of charge yet.[20] The GATS education negotiating proposals submitted in view of the Doha round of negotiations, which started in 2000 and was originally scheduled to conclude by January 2005, hence stress that further liberalisation of trade in education services should not affect the provision of public education and should not occur with regard to compulsory education.[21] It is surprising, however, that up to now more or less as many liberalisation commitments

[18] See the Services Sectoral Classification List, Doc. MTN.GNS/W/120, based on the UN Provisional Central Product Classification (CPC).

[19] See the Study of the Right to Education Project, see note 15 *supra*, under the heading "The broad coverage of education in GATS".

[20] See *ibidem*, under the heading "The need to facilitate—not undermine—the right to education in developing countries".

[21] See the GATS education negotiating proposals submitted by the United States of America (S/CSS/W/23 of 18 December 2000), New Zealand (S/CSS/W/93 of 26 June 2001), Australia (S/CSS/W/110 of 1 October 2001) and Japan (S/CSS/W/137 of 15 March 2002).

have been entered for primary education as for higher education.[22] It may be stated that the danger generally exists that "a conceptual shift towards characterising education as a 'property right' may be a precursor to the subjecting of all education—including compulsory education—to liberalisation pressures".[23]

It is not suggested that free trade in education services should not be permitted whatsoever. It must, however, be clearly restricted to post-compulsory education, and it must supplement rather than displace public education. Education should not merely be seen as a commodity. A general commercialisation of education would contradict the idea that education is a human right, requiring states to fund a system of public schools which is devoted to free education of a high quality.

2.3. *The Right to Education and External State Obligations*

Under article 2(1) ICESCR, states parties do not only have internal, but also external state obligations. *Internal state obligations* are human rights duties of a state party towards the individuals under its jurisdiction. *External state obligations* are human rights duties of a state party towards other states parties and the individuals under the jurisdiction of these states parties.[24] The latter type of state obligations has a bearing on the conduct of states parties concerning the granting of bilateral assistance, and also on their conduct within the framework of intergovernmental organisations, providing multilateral assistance. The bilateral assistance community and intergovernmental organisations, such as the World Bank, often fail to incorporate a human rights perspective into their development policies. This may undermine human rights, as even honest attempts of individual states parties at realising human rights will often be frustrated where international development policies do not duly respect human rights.

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[22] For a list of liberalisation commitments in each of the five education subsectors, see the Study of the Right to Education Project, see note 15 *supra*, Table 1. Presently, some 45 of 148 WTO members have entered commitments in the education sector. Although the number of commitments so far is still relatively small, this may change in the future.

[23] See the Study, see note *supra*, under the heading "The need to halt and reverse conversion of education from a human right into a commodity for sale".

[24] See the discussion of the phrase "individually and through international assistance and co-operation, especially economic and technical", contained in art. 2(1) ICESCR, at 9.2.2.2. *supra*, where it has been stated that it may be argued that, by virtue of the phrase concerned, international assistance and co-operation may in appropriate instances be a legal obligation of states parties to the ICESCR. See also Coomans, 1992, pp. 37–38. See further Craven, 1995, pp. 147–150, who, regarding external state obligations, deems states to have a *duty to respect*, *i.e.* to refrain from any action that unduly interferes with the ESCR of those in other states, a *duty to protect*, *i.e.* to ensure that individuals and bodies under their jurisdiction do not violate the ESCR of those in other states, and a *duty to fulfil*, *i.e.* to provide aid to less affluent countries.

2.3.1. *Bilateral Assistance to Education*

These days, it is widely accepted that bilateral (and multilateral) assistance to education (as development assistance generally) should be based on three core principles.[25] The first principle relates to the importance of sound "nationally owned" partner country policies. It recognises the right—and also duty—of partner countries to formulate credible development/poverty reduction/education policies and to set priorities concerning their implementation. The second principle requires close alignment of donor countries' assistance with partner countries' policies and priorities. This implies the adoption of a sector-wide approach (SWAP) to education assistance, under which "it is aimed to abandon previous donor projects in favour of long-term budgetary support to the education sector as a whole, and to strengthen governmental structures rather than continuing parallel donors' set-ups".[26] The third principle, finally, envisages harmonisation of the practice of donor countries. Donor countries should develop common approaches to funding and harmonised aid procedures to minimise costs for donor and partner countries and to enhance the efficiency of assistance.[27]

The bilateral assistance policies of donor countries must take into account that education is a human right. This means that a significant proportion of bilateral aid should be committed to education. It has thus been suggested that donor countries should commit 25 per cent of bilateral aid to education.[28] In reality, however, only about 10 per cent of bilateral aid is committed to education.[29] Bilateral aid to education should further go to primary rather than higher education, it should not be spent disproportionately in donor countries (supporting students from partner countries who attend university in donor countries), and it should be destined to the poorest rather than middle-income countries.[30] The bilateral assistance poli-

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[25] "Bilateral assistance" refers essentially to grants, concessional loans and technical assistance which donor countries make available to partner countries. "Donor countries" means principally the members of the Development Assistance Committee (DAC) of the Organisation for Economic Co-operation and Development (OECD) minus the Commission of the European Communities.

[26] Sector-wide approach (SWAP) to education assistance as defined by Tomaševski, 2000a, para. 18 (UN Doc. E/CN.4/2000/6). This is not to say, of course, that project aid does not also have its merits in appropriate circumstances, for example, to facilitate pilot activity.

[27] On the three core principles and related matters, see UNESCO, 2004, pp. 196–212.

[28] See Delors, J. *et al.*, *Learning: The Treasure Within: Report to UNESCO of the International Commission on Education for the Twenty-First Century*, Paris: UNESCO, 1996, p. 33.

[29] See UNESCO, 2004, p. 189, Figure 5.2, covering the period from 1990 until 2002. Whereas donor countries committed US$5,4 billion to education in 1990, the amount decreased to US$4,2 billion in 2002. Presently, about 30 per cent of bilateral aid to education is committed to basic education. See UNESCO, 2004, p. 191, Table 5.2, showing the two-year averages for 2001–2002. Generally, for facts and figures and analyses thereof concerning aid flows to education, see UNESCO, 2004, pp. 188–196.

[30] See Tomaševski, 2000a, para. 15 (UN Doc. E/CN.4/2000/6).

cies of donor countries should emphasise rights-based development, define education as a human right, be committed to free and compulsory primary education, pursue the goal of non-discrimination and stress the importance of gender equality.[31] In 2003, the Global Campaign for Education[32] released a report, scrutinising "22 rich countries' aid to basic education", relying on certain standards, which may, in fact, be argued to be human rights criteria.[33] Firstly, donor countries should commit 0,7 per cent of their gross national product to official development assistance (ODA).[34] Secondly, at least 4 per cent of that aid should be devoted to basic education.[35] Thirdly, at least 80 per cent of education aid should be given to the poorest countries.[36] Fourthly, at least 80 per cent of education aid should be "untied".[37] Fifthly, donor countries should demonstrate their commitment to a global solution for funding basic education, particularly, by contributing at least 50 per cent of their "fair share" to the Education for All Fast-Track Initiative.[38] The report revealed that only four countries complied with the

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[31] For an analysis of the right to education in the development assistance policies of a number of donor countries in terms of the above requirements, see the Study, entitled *An Overview of the Right to Education in Development Assistance Policy*, prepared by the Right to Education Project (public access human rights resource), available on the website of the Project at www.right-to-education.org.

[32] The Global Campaign for Education is a global alliance of development organisations and teachers' unions in 180 countries who promote education as a human right.

[33] See Phillips, B. *et al.* (Global Campaign for Education), *Must Try Harder: A "School Report" on 22 Rich Countries' Aid to Basic Education in Developing Countries*, Brussels: Global Campaign for Education, 2003.

[34] It is widely accepted that official development assistance (ODA) should be set at 0,7 per cent of the gross national product. This has lately been confirmed in para. 42 of the Monterrey Consensus, adopted by the International Conference on Financing for Development, held at Monterrey, Mexico from 18–22 March 2002.

[35] This percentage has been calculated in view of the fact that UNESCO in its Education for All Global Monitoring Report 2002 stated that there existed a funding gap for basic education of US$5,6 billion. In terms of the 20/20 Initiative, originating from UNICEF (see the contribution of UNICEF to the Fourth Session of the Preparatory Committee for the World Conference on Human Rights, UN Doc. A/CONF.157/PC/61/Add.15, para. 25) and endorsed by the 1995 World Summit for Social Development, developing countries should allocate about 20 per cent of the budget, and industrialised countries 20 per cent of official development assistance (ODA) to basic social services, *i.e.* basic health care and basic education (see *Implementing the 20/20 Initiative: Achieving Universal Access to Basic Social Services*, a joint publication of UNDP, UNESCO, UNFPA, UNICEF, WHO and the World Bank, New York, 1998, p. 1).

[36] "The poorest countries" means low-income, including least developed, countries. The report, see note 33, p. 32, states, "[T]oo many rich countries are determining which countries should receive aid for reasons other than poverty reduction—such as cultural, economic, political or military links. This is hampering progress towards Education for All".

[37] Aid is "untied" if its granting is not dependent on the receiving country agreeing to restrictions on the places from where products or personnel can be sourced. The report, see note 33, p. 34, states, "Tying aid makes the aid less effective, as countries cannot go for the best-value option, and it increases dependency on foreign products and personnel. Rich countries do it because they want to benefit themselves".

[38] On the calculation of the "fair share", see the report, see note 33, p. 40. The Education for All Fast-Track Initiative will be discussed at 12.2.3.2. *infra.*

first, two with the second, six with the third, four with the fourth, and four with the fifth requirement. It is evident, therefore, that, at present, official development assistance does not adequately protect the right to education.

2.3.2. *Multilateral Assistance to Education: The Case of the World Bank*

Many developing countries, in their efforts to achieve economic and social progress, rely substantially on multilateral assistance, *i.e.* development assistance granted by intergovernmental organisations, being made available to them.[39] The CESCR, in its second General Comment, dealing with the topic of technical assistance by UN organs and agencies, points out that "development co-operation activities do not automatically contribute to the promotion of respect for economic, social and cultural rights" and that "[m]any activities undertaken in the name of 'development' have subsequently been recognised as ill-conceived and even counter-productive in human rights terms". UN organs and agencies providing development assistance are, therefore, admonished that "[i]n order to reduce the incidence of such problems, the whole range of issues dealt with in the [ICESCR] should, wherever possible and appropriate, be given specific and careful consideration".[40] Regarding the right to education, the Committee similarly observes in General Comment No. 13 that "[t]he adoption of a human rights-based approach by UN specialised agencies, programmes and other UN bodies, will greatly facilitate implementation of the right to education".[41] The adoption of such an approach assumes special importance in as far as the World Bank is concerned. The World Bank says of itself that

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[39] "Multilateral assistance" refers essentially to grants, concessional loans and technical assistance which intergovernmental organisations make available to beneficiary countries. "Intergovernmental organisations" means principally the International Development Association (forming part of the World Bank), all other UN organs and agencies which are involved in development co-operation activities, the Commission of the European Communities, the African Development Fund, the Asian Development Fund and the Inter-American Development Bank. On average, intergovernmental organisations committed US$1,48 billion to education in 2001 and 2002. This constituted 27 per cent of total bilateral and multilateral aid to education. Approximately 40 per cent of multilateral aid to education was committed to basic education. See UNESCO, 2004, p. 195, Table 5.6. Generally, for facts and figures and analyses thereof concerning aid flows to education, see UNESCO, 2004, pp. 188–196. In the discussion below, "multilateral assistance" will be defined broadly to cover also commercial loans made available by the International Bank for Reconstruction and Development (forming part of the World Bank) and the regional development banks.

[40] CESCR, General Comment No. 2 (Fourth Session, 1990) [UN Doc. E/1990/23] International technical assistance measures (art. 22 ICESCR) [*Compilation*, 2004, pp. 12–14], para. 7.

[41] CESCR, General Comment No. 13 (Twenty-First Session, 1999) [UN Doc. E/2000/22] The right to education (art. 13 ICESCR) [*Compilation*, 2004, pp. 71–86], para. 60. The full text of the General Comment is included in the Annex to this book.

it "remains today the world's single largest provider of external funding for education".[42] It thus significantly depends on its lending policies—whether these duly take into account that education is a human right—whether or not countries granted loans are able to implement the right to education.

The importance of adopting a human rights approach in the context of multilateral development co-operation activities focusing on education, and the basis on which intergovernmental organisations may be held to be legally bound to adopt this approach, will now be explained with regard to the *World Bank*.[43]

When African countries encountered major economic problems during the 1980s, the World Bank made adjustment loans available to such countries, subject to beneficiary countries adopting structural adjustment programmes (SAPs). These were intended to stabilise the economic system of beneficiary countries and to promote economic growth. Beneficiary countries were expected, *inter alia*, to balance the budget through budget cuts. This generally led to constricted social spending. In the field of education, reduced budgetary allocations were accompanied by the introduction of school fees in primary education, based on the World Bank's model of cost-sharing, whereby a variety of school fees was charged in primary education.[44] This had the effect of denying access to primary education to

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[42] The World Bank, *Education*, World Bank Issue Brief, September 2004, www.worldbank.org. The World Bank awarded its first education loan in 1963. In the 1960s, education lending averaged US$35 million per annum (3% of total lending), in the 1990s US$1,8 billion (7,7% of total lending) and in the period 2000–2004 US$1,4 billion (8% of total lending). These figures reflect actual prices. In 2004, 69% of education lending was concessional in character (44% in 2003), 52% supported primary education (33% in 2003) and the largest share, 40%, went to the South Asian region (33% to the Latin American and Caribbean region in 2003). Generally, for facts and figures concerning World Bank education lending, see the website of the World Bank at www.worldbank.org.

[43] The World Bank is a UN Specialised Agency. It includes *inter alia* the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA). The IBRD provides commercial (low-interest) loans to middle-income countries, the IDA concessional (no-interest) loans and grants to low-income countries. Only IDA assistance customarily counts as multilateral aid. The World Bank offers two basic types of loans: investment loans, in support of economic and social development projects in a broad range of sectors, and development policy loans (formerly known as adjustment loans), providing quick-disbursing finance to support structural reforms of the economic and social system. Additionally to its loans and grants, the World Bank also renders "analytical and advisory services". On human rights considerations in the context of the policies of the World Bank, see Tomaševski, 1999a, para. 20 (UN Doc. E/CN.4/1999/49), Tomaševski, 2000a, paras. 23–29 and paras. 48–55 (UN Doc. E/CN.4/2000/6), Tomaševski, 2001a, paras. 31–42 and para. 81 (UN Doc. E/CN.4/2001/52), Tomaševski, 2002a, paras. 14–16 (UN Doc. E/CN.4/2002/60), Tomaševski, 2003a, paras. 5, 9, 11, 13, 33, 34 and 38 (UN Doc. E/CN.4/2003/9) and Tomaševski, 2004a, paras. 9–10 (UN Doc. E/CN.4/2004/45).

[44] The World Bank's support for school fees in primary education is commonly stated to have had its origin in a study on Malawi by Thobani, M., *Charging User Fees for Social*

children whose parents could not afford school fees. The World Bank's advocacy of school fees in primary education clearly contradicted international human rights law, requiring that primary education be free of charge.[45] In 1990, the CESCR, in General Comment No. 2, expressed concern at the adverse impact of SAPs on ESCR. The Committee recognised that SAPs would often be unavoidable and that they would frequently involve "a major element of austerity". It emphasised, however, that SAPs would have to protect the most basic ESCR and that they would have to safeguard the rights of the poor and vulnerable.[46] In 1992 then, the World Bank adopted Operational Directive (OD) 8.60, advising its staff to ensure that adjustment operations support poverty reduction and mitigate the social costs of adjustment.[47] OD 8.60 has been replaced by Operational Policy/Bank Procedures (OP/BP) 8.60 in 2004.[48] Henceforth, adjustment loans are known as development policy loans. OP/BP 8.60 requires the World Bank to determine whether country policies which it supports "are likely to have significant poverty and social consequences" and, where this is so, to ensure that shortcomings which may exist in a borrower's systems for reducing adverse effects and enhancing positive effects associated with such policies are properly addressed. Although OD 8.60 had meant an improvement in the status of the right to education and other ESCR in World Bank policy, the notion of cost-sharing in primary education continued to guide subsequent adjustment lending operations. Cost-sharing in primary education has further also formed part of the World Bank's investment lending operations.

As the World Bank's detailed operational policies do not deal with the issue of school fees in primary education, the Bank's current policy position on this issue must be deduced from other broad policy statements. The Bank's Education Sector Strategy of 1999, though addressing funding in various parts, does not require primary education to be free of charge.[49] Instead, it argues that "fees and other contributions paid by non-poor

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Services: The Case of Education in Malawi, Washington, D.C.: The World Bank, 1983 (World Bank Staff Working Paper No. 572), which had argued that school fees would not decrease enrolment and cause poor students to drop out of school. This is what happened, however, when school fees were introduced in Malawi in 1982. When school fees were eliminated in 1994, enrolment doubled. See Tomaševski, 2000a, para. 48, note 39 (UN Doc. E/CN.4/2000/6).

[45] See Tomaševski, 1999a, para. 20 (UN Doc. E/CN.4/1999/49) and Tomaševski, 2000a, para. 48 (UN Doc. E/CN.4/2000/6).

[46] General Comment No. 2, see note 40, para. 9.

[47] See Operational Directive (OD) 8.60, Adjustment Lending Policy (21 December 1992).

[48] See Operational Policy (OP)/Bank Procedures (BP) 8.60, Development Policy Lending (11 August 2004).

[49] The World Bank, *Education Sector Strategy*, Washington, D.C.: The World Bank, 1999.

beneficiaries could free up public resources for targeting to the poor".[50] In an Issue Brief on User Fees of August 2003,[51] the Bank emphasises that it "does not support user fees for primary education . . . for poor people". It adds that "[w]here governments do levy user fees, the Bank helps to reduce the burden on poor people by recommending, and providing finance for targeted subsidies". It further considers that user fees levied by local communities "can build community support for local schools and subsequently improve the quality of, and expand the access to, education". The above policy statements reflect a rather weak commitment to free primary education. They appear to permit school fees for those who are not poor (or not poor enough) by the Bank's criteria, refer favourably to fee mitigating measures, such as subsidies, which are often expensive to administer and tolerate user fees levied by local communities.

A World Bank Survey of 2001, which had reviewed the charging of school fees in primary education in 79 countries in which the Bank provided loans for education, showed that this practice was widespread, 77 countries charging at least one fee.[52] Following an analysis of its education lending practice, the Bank further acknowledged that many of its pre-2000 and certain of its recent operations supported school fees, notably textbook charges and community contributions.[53] In the light of these findings, but also in view of the fact that the abolition of school fees in primary education in the past few years in several African countries, such as Malawi (1994), Uganda (1996), Tanzania (2001) or Kenya (2003), caused a dramatic surge in enrolments, the Bank now seems willing to oppose school fees in primary education more vehemently in future. At the same time, it stresses that, in order to maintain the quality of education, an alternative source of income will have to be found. It holds that replacement revenues

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[50] *Ibidem* at p. 19.

[51] The World Bank, *User Fees*, World Bank Issue Brief, August 2003, www.worldbank.org.

[52] The Bank's survey showed that there were tuition fees in 30 countries, textbook charges in 37, compulsory uniforms in 39, Parent Teacher Association dues/community contributions in 56 and activity fees in 34. For a summary of the Bank's survey, see Bentaouet Kattan, R. and N. Burnett, *User Fees in Primary Education*, Washington, D.C.: The World Bank, 2004, part 2. Note should further be taken of the Study prepared by Katarina Tomaševski, former Special Rapporteur of the Commission on Human Rights on the Right to Education, globally reviewing the charging of school fees in primary education—defining school fees broadly to cover also, for example, transportation, school meals and private tuition. It found the charging of school fees to be particularly widespread in Asia (18 out of 22 countries), Eastern Europe and Central Asia (14 out of 20 countries) and Africa (28 out of 44 countries). It noted that many countries referred to Bank-supported programmes as the reason for school fees. See Tomaševski, K., *School Fees as Hindrance to Universalising Primary Education*, 2003 (Background Study for EFA Global Monitoring Report 2003/4). The results of both reviews are remarkable, as most of the countries concerned are bound by international or national law, requiring primary education to be free of charge.

[53] See Bentaouet Kattan and Burnett, see note 52, pp. 21–23.

can be provided by increasing expenditure on education, by improving the efficiency of education spending, by using funds available by virtue of participation in the Enhanced Heavily Indebted Poor Countries (HIPC) Initiative or by using funds from the Education for All (EFA) Fast-Track Initiative (FTI) Catalytic Fund.[54]

The HIPC Initiative, established in 1996 by the World Bank and the International Monetary Fund, as enhanced in 1999, aims to reduce the excessive debt burdens of the poorest countries and strengthens the link between debt relief and poverty reduction. The basic requirement are Poverty Reduction Strategy Papers (PRSPs) which countries must prepare and which are to serve as blueprints for the allocation of funds released through debt relief to development, including education. The PRSPs of some countries thus envisage the complete or partial abolition of school fees.[55]

The Education for All (EFA) Fast-Track Initiative (FTI), established in 2002 and led by the World Bank, is a global arrangement involving the major bilateral and multilateral aid donors, designed to accelerate progress towards the achievement of universal primary school completion by 2015.[56] Low-income countries with a PRSP and a "credible" education sector plan[57] are eligible to participate in the FTI. With regard to countries whose education sector plans have been endorsed, aid donors agree to mobilise any additional finance required by the countries to achieve universal primary education, whereas beneficiary countries, for their part, agree to monitor their performance in implementing their education sector strategies. The FTI Catalytic Fund, a multi-donor trust fund, provides transitional finance to those countries whose education sector plans secure insufficient donor support.[58] Although the FTI may be stated to be the first focused

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[54] See *ibidem*, particularly at pp. 23–26.

[55] For an overview of references to school fees in PRSPs, see Tomaševski, 2003e, point 5.2. Tomaševski criticises that no human rights analysis of PRSPs has been carried out so far.

[56] On the Education for All (EFA) process, see 7.3. *supra*. The FTI's primary frame of reference is the Monterrey Consensus, adopted by the International Conference on Financing for Development, held at Monterrey, Mexico from 18–22 March 2002. This calls upon states and intergovernmental organisations to work through new development partnerships, based on mutual accountability and responsibility, for achieving the development goals formulated by the UN Millennium Declaration, adopted by UNGA Resolution 55/2 of 8 September 2000, including universal primary education by 2015.

[57] The "credibility" of a country's education sector plan is measured in terms of its compliance with the benchmarks of the FTI Indicative Framework. The benchmarks require, amongst others, that government revenue constitute 14–18 per cent of GDP, the education share of the budget 20 per cent, the primary education share of the education budget 42–64 per cent, the average annual salary of primary school teachers 3,5 times GDP *per capita* and non-salary spending 33 per cent of total recurrent spending on primary education.

[58] For more information on the FTI, see World Bank-FTI Secretariat, *Education for All Fast-Track Initiative: Accelerating Progress Towards Quality Universal Primary Education: Framework*,

financing framework for the achievement of universal primary education, the additional finance it has been able to mobilise so far falls far short of what is, in fact, needed.[59]

All the above having been said, the importance of adopting a human rights approach in the context of multilateral development co-operation activities focusing on education becomes evident.[60] The question, however, is on which basis intergovernmental organisations may be held legally bound to adopt such an approach. Human rights obligations, legally binding on intergovernmental organisations, may flow from the founding instruments of the organisations concerned or from rules of self-restraint adopted by them. To determine whether there is a legal rationale for human rights concerns to guide World Bank operations, the Bank's Articles of Agreement and its operational policies, based on the Articles of Agreement and approved by the Bank's Board of Executive Directors, need to be studied. A reading of the Articles of Agreement shows that the World Bank's purposes, as set out in the Articles of Agreement, do not provide a legal rationale for human rights concerns.[61] The World Bank has adopted a number of safeguard policies, addressing matters such as indigenous peoples and involuntary resettlement, which use certain human rights language. There are, however, no operational policies for education or for human rights, or which recognise that primary education must be free of charge.[62] It has, therefore, been suggested that the World Bank should, as a first step in confirming its commitment to human rights in the area of education, amend its operational policies so as to prioritise primary education for all, free of

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Washington, D.C.: The World Bank, 2004. See also UNESCO, 2003, pp. 247–253 and UNESCO, 2004, pp. 213–218.

[59] For a critical analysis of FTI performance, see Global Campaign for Education, *Education for All Fast-Track: The No-Progress Report (that they didn't want you to see)*, Brussels: Global Campaign for Education, 2003 (Briefing Paper).

[60] Para. 60 General Comment No. 13, see note 41, states, "In particular, the international financial institutions, notably the World Bank and IMF, should pay greater attention to the protection of the right to education in their lending policies, credit agreements, structural adjustment programmes and measures taken in response to the debt crisis". Para. 60 goes on to state that "[w]hen examining the reports of States parties, the Committee will consider the effects of the assistance provided by all actors other than States parties on the ability of States to meet their obligations under article 13".

[61] See art. I IBRD Articles of Agreement and art. I IDA Articles of Agreement. Art. IV, sect. 10 IBRD Articles of Agreement and art. V, sect. 6 IDA Articles of Agreement further emphasise that only economic considerations are relevant to the decisions of the World Bank.

[62] In 2001, the World Bank adopted Operational Guidelines for Textbooks and Reading Materials, which include the principle that "cost [must] not be an obstacle for poor students' access to textbooks and reading materials". The Guidelines do not say, however, in which ways this access might be achieved. There is a reference to human rights elsewhere in the Guidelines to the effect that "[t]he Bank reserves the right to withdraw funding for books which can be shown to breach some provisions of [the UDHR]".

charge.[63] Presently, the World Bank appears to be beyond the reach of international human rights law. It has, however, been argued that, because the World Bank is a UN Specialised Agency, and for this reason enjoys a special relationship to the UN Charter, and because it, like other UN organs and agencies, has been given a special role to play in the implementation of the two UN Covenants on human rights, it should be considered legally bound to respect the international human rights obligations binding on beneficiary countries, and further—irrespective of the obligations binding on individual countries—to respect international human rights law.[64]

A different approach to the question of the basis on which to hold intergovernmental organisations legally bound to respect human rights is to concentrate on the obligations of states (rather than those of intergovernmental organisations). The UN Covenants on human rights also give rise to external state obligations. These expect states parties, *inter alia*, to take account of the rights of the Covenants when acting through intergovernmental organisations.[65] Paragraph 56 General Comment No. 13[66] hence observes:

> States parties have an obligation to ensure that their actions as members of international organisations, including international financial institutions, take due account of the right to education.

In other words, states parties to the ICESCR also bear a responsibility for ensuring that the policies of intergovernmental organisations, such as the World Bank, adequately protect the right to education.

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[63] See Tomaševski, 2001a, para. 41 (UN Doc. E/CN.4/2001/52). It should be noted that, in 1993, the World Bank established an Inspection Panel, to provide a forum to private citizens who claim actual or threatened material adverse effects on their rights or interests flowing from failure by the Bank to follow its own operational policies in connection with a Bank-financed project. As has been stated, however, there are no operational policies for education or for human rights.

[64] See Skogly, S., "The position of the World Bank and the International Monetary Fund in the human rights field", in: R. Hanski and M. Suksi (eds.), *An Introduction to the International Protection of Human Rights: A Textbook*, Åbo: Institute for Human Rights (Åbo Akademi University), 1997, pp. 193–205, at pp. 199–202. It should be noted that General Comment No. 13, see note 41, at para. 60, refers to the role of the UN agencies relating to the realisation of art. 13 under the heading "Obligations of actors other than states parties".

[65] See Skogly, see note *supra*, p. 200.

[66] See note 41.

3. *Improving the Supervision of the Right to Education in Article 13 ICESCR Under the ICESCR*

Chapter 8 has explained that supervision of the ICESCR takes place by means of a system of state reports. Under the system, states parties to the ICESCR are obliged to prepare reports on the measures they have taken to implement Covenant rights. The reports of states parties are then considered by the CESCR. It may now be asked whether the system of state reports is, in fact, a satisfactory procedure to ensure compliance by states parties with Covenant rights, including the right to education, protected in article 13 ICESCR. The following section will argue that the system of state reports has distinct strengths and should, therefore, be retained. The effectiveness of the system should, however, be enhanced, by improving the quality of state reports, by developing the Committee's use of indicators, and by encouraging the active participation of UNESCO and other UN organs and Specialised Agencies in the supervisory system. Nevertheless, it will also be argued that there are limits to what the system of state reports is capable of accomplishing. The discussion will suggest that the limits involved may be effectively addressed by adopting an Optional Protocol to the ICESCR, providing for individual and group complaints in relation to the rights of the ICESCR, including article 13, to be considered by the CESCR. When considering such complaints, a "violations approach" to ESCR needs to be adopted. The meaning of a "violation" of an ESCR will be elucidated. An attempt will then be made to identify "violations" of the right to education. Special attention will be given to "violations" in the form of a failure to comply with the core content of the right to education.

3.1. *The Strengths of the System of State Reports and How to Enhance the Effectiveness of the System*

3.1.1. *The Strengths of the System of State Reports*

The system of state reports should not be criticised on the basis that it does not enable individuals and groups to complain that a state party does not comply with its obligations under the ICESCR. This is not the purpose of the system. The examination of individual and group complaints in international human rights law is achieved by individual/group petition procedures. Granted, no such procedure exists with regard to the ICESCR. However, this only supports an argument in favour of creating a procedure

of the said nature in respect of the ICESCR.[67] But, it does not provide a basis for advocating that the system of state reports should be abolished.

The purpose of the system of state reports is, as it were, to compel states parties to undertake measures aimed at realising Covenant rights.[68] The duty to prepare reports forces states parties to review the existing state of realisation of ESCR in their respective territories. As a result, they will become aware of shortcomings concerning the enjoyment of the said rights. This enables them to elaborate clearly stated policies for realising the Covenant, and then to implement these policies. As states parties must prepare reports periodically, they will also be in a position to monitor and secure the *progressive* realisation of Covenant rights.[69] The CESCR's role is to assist states parties in their efforts to implement the rights protected in the Covenant. It does so by discussing the reports with representatives of the states parties concerned, and by making recommendations on how to improve performance under the Covenant. In serious cases, though, the Committee will express its dissatisfaction with an unsatisfactory situation concerning the implementation of Covenant rights. The system of state reports may, therefore, be said to provide a framework within which a "constructive dialogue" between the Committee and states parties may take place, intended to facilitate the realisation of Covenant rights. It is, in particular, this purpose of the system of state reports—that of inducing states parties, through critical reflection, to take steps directed at improving the enjoyment of Covenant rights, the Committee assisting them in this regard—which justifies the retention of the system.[70]

3.1.2. *How to Enhance the Effectiveness of the System of State Reports*

To adequately fulfil the purpose mentioned in 12.3.1.1., the effectiveness of the system of state reports should, however, be enhanced in three respects, to be discussed below.

3.1.2.1. *Improving the quality of state reports*

Although many states parties to the ICESCR submit reports of good quality and do so on time, others comply with their reporting obligation in an

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[67] See 12.3.2.2. *infra*.

[68] See Gebert, 1996, pp. 52–53.

[69] See 8.4.1. *supra*, where the objectives of the system of state reports have been discussed.

[70] The system of state reports also serves another important purpose. On the basis of the CESCR's consideration of state reports, ECOSOC may initiate political processes at the international level intended to promote the realisation of ICESCR rights. To this end, it may, for example, make appropriate recommendations to the UN General Assembly (art. 21 ICESCR) or it may suggest to UN organs and Specialised Agencies the furnishing of technical assistance (art. 22 ICESCR).

inadequate manner.[71] Some states parties fail to submit reports on time or, worse, to submit reports whatsoever. Various states parties submit reports which set out the *de iure* position concerning Covenant rights only, merely reciting constitutional and legal provisions, neglecting to describe the *de facto* position concerning such rights, *i.e.* whether the population, especially vulnerable sections thereof, enjoys these rights in practice. State reports frequently do not indicate difficulties affecting the implementation of Covenant rights. Sometimes they do no more than boast about successes. Many state reports are further superficial and omit to include detailed descriptive and statistical information regarding the state of realisation of Covenant rights, to enable the CESCR to properly evaluate state performance under the Covenant. Yet another problem is that many states parties do not mention in their reports the specific benchmarks they have set themselves, against which the Committee can assess progress as regards the implementation of Covenant rights. It will also be noted that several states parties do not, at all or properly, follow the CESCR's guidelines regarding the form and contents of state reports, when preparing reports.

Paragraph 74 of the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights[72] emphasises:

> The effectiveness of the supervisory machinery provided in Part IV of the Covenant depends largely upon the quality and timeliness of reports by States parties. Governments are therefore urged to make their reports as meaningful as possible. For this purpose they should develop adequate internal procedures for consultations with the competent government departments and agencies, compilation of relevant data, training of staff, acquisition of background documentation, and consultation with relevant non-governmental and international institutions.

The preparation of reports is usually co-ordinated by the Ministry of Foreign Affairs. For reports to be informative and detailed, the relevant subject ministries, in the case of article 13 ICESCR the ministries responsible for education affairs, need to contribute in a meaningful manner to the preparation of reports. The officials in the ministries should be duly acquainted with the objectives of the reporting procedure, the way reports should be prepared and the importance of the international obligations assumed by states parties under the ICESCR. Officials should receive thorough training to this end.

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[71] See Coomans, 1992, pp. 213–214.

[72] On the Limburg Principles, see 9.2. *supra*. The Limburg Principles have been published in the *Human Rights Quarterly*, Vol. 9, 1987, pp. 122–135.

It is also important that non-governmental organisations (NGOs) be afforded the opportunity to become actively involved in the preparation of reports.[73] Concerning article 13 ICESCR, teachers' organisations, students' organisations and organisations representing the interests of private educational institutions should have the right to comment on the government's draft report. Both draft report and NGO comments should be published for public discussion, before the final report is submitted to the CESCR.[74] NGO comments should also be submitted to the Committee as separate documents.[75] NGOs may in addition play a useful role by submitting independent "shadow reports" on the situation of the right to education and other ESCR in a state party. These may serve to expose biased information presented in state reports.[76]

When reporting on steps taken to give effect to article 13 ICESCR, states parties should not only describe relevant legislative provisions. They should also comment on the judicial remedies, administrative procedures and other measures adopted for enforcing this right and the practice under the remedies and procedures.[77] The reports of states parties should further mention what difficulties states parties have experienced in the implementation of the right to education. Whenever appropriate, state reports should indicate the areas of education where more progress could be achieved through international co-operation and suggest programmes of technical assistance that might be helpful to this end.[78] It is, furthermore, also important that "[q]uantitative information should be included in the reports of States parties in order to indicate the extent to which the rights are protected in fact".[79] This is especially necessary with regard to the educational situation of vulnerable groups in society. Therefore, when reporting on steps taken to promote equal treatment and equal opportunities for these groups in the field of education, statistical information needs to be added to reports to show whether, and, if so, to what extent, such steps have been successful. The reports of states parties should, moreover, specify the

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[73] Para. 77 Limburg Principles, see note 72, states, "States parties are encouraged to examine the possibility of involving non-governmental organisations in the preparation of their reports".

[74] Para. 76 Limburg Principles states in part, "States parties should view their reporting obligations as an opportunity for broad public discussion on goals and policies designed to realise economic, social and cultural rights. For this purpose wide publicity should be given to the reports, if possible in draft".

[75] See Coomans, 1992, pp. 279–280.

[76] On the role of NGOs in the context of art. 13 ICESCR, see Coomans, 1992, pp. 290–293.

[77] Para. 78 Limburg Principles, see note 72.

[78] *Ibidem* at para. 81.

[79] *Ibidem* at para. 79.

specific benchmarks states parties have set themselves concerning the realisation of the right to education.[80] This will enable the Committee to evaluate state performance with regard to the right. Finally, states parties should properly follow the Committee's reporting guidelines when reporting on the steps taken to realise article 13.[81]

3.1.2.2. *Developing the use of indicators by the Committee on Economic, Social and Cultural Rights*

Paragraph 89 Limburg Principles[82] states in part:

> The Committee should devote adequate attention to the methodological issues involved in assessing compliance with the obligations contained in the Covenant. Reference to indicators, in so far as they may help measure progress made in the achievement of certain rights, may be useful in evaluating reports submitted under the Covenant.

The CESCR should develop its use of indicators, as these may assist in assessing compliance by states parties with Covenant rights, including article 13 ICESCR. An indicator is a question, the answer to which is given in a quantified form, and which, especially if used over a period of time, points to compliance or non-compliance with the Covenant (for example, what is the educational expenditure per student?).[83] In the Committee's consideration of state reports, indicators may serve a dual purpose.[84] On the one hand, they may be used to *measure progress* with regard to the realisation of Covenant rights in a state party. In this context, indicators will be used to indicate whether a state party has taken steps towards realising Covenant rights, whether it has utilised the maximum of its available resources, whether there is an improvement in respect of the enjoyment of Covenant rights over the years and whether different groups in society exercise Covenant rights on an equal basis. On the other hand, indicators may be used to *ascertain whether a state party guarantees minimum levels of enjoyment*

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[80] Para. 79 Limburg Principles directs states parties to adopt "clearly defined targets" when implementing the ICESCR. See also para. 52 General Comment No. 13, see note 41, which, in relation to art. 13(2)(b)–(d) ICESCR, expects states parties to make use of benchmarks on the right to education, by which progress can be closely monitored.

[81] The CESCR's reporting guidelines, in as far as these relate to art. 13 ICESCR, have been commented on at 8.4.2. *supra.*

[82] See note 72.

[83] For more information on ESCR indicators, see, for example, the reports prepared by the former Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on Economic, Social and Cultural Rights, Danilo Türk: UN Docs. E/CN.4/Sub.2/1990/19, paras. 1–105, E/CN.4/Sub.2/1991/17, paras. 6–48 and E/CN.4/Sub.2/1992/16, paras. 182–186. Special note should also be taken of the CESCR's Day of General Discussion on economic and social indicators, organised during its sixth session in 1991.

[84] See Coomans, 1992, p. 298.

with regard to each Covenant right. In this context, indicators will be applied to indicate whether a state party may be stated to have violated a Covenant right by not having satisfied aspects of the core content of the right concerned. Indicators may, for example, be used to indicate whether article 13 ICESCR has been violated by not having ensured that compulsory and free primary education is available to all.[85] In what follows, attention will be given to the purpose of measuring progress.

It may be asked how indicators may help the Committee in its evaluation of whether there has been progress with regard to the realisation of article 13 ICESCR in a state party.[86] It is suggested that a three-step process be applied in this respect: Step one involves selecting indicators, step two setting national benchmarks and step three monitoring the national benchmarks.[87]

Step 1

The first step, *the selection of relevant indicators concerning article 13*, is the task of the Committee, UN Specialised Agencies, in particular UNESCO,[88] and independent education experts.[89] It is important that the indicators selected are clearly related to education as a human right (and not, for instance, as a goal of social development). This can be assured, for example, by selecting relevant indicators within the framework of the so-called 4-A scheme, in terms of which the right to education entails that education must be available, accessible, acceptable and adaptable. The mentioned scheme has been developed by Katarina Tomaševski, former Special Rapporteur of the Commission on Human Rights on the Right to Education, and it has been discussed in Chapter 10 above.[90] The following may serve as an illustration:

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[85] The matter of the core content of the right to education and violations of art. 13 ICESCR will be dealt with at 12.3.2.3.2.1. *infra*.

[86] On the use of indicators in the context of art. 13 ICESCR, see Coomans, 1992, pp. 297–302.

[87] See Hunt, 1998, paras. 9–23 (UN Doc. E/C.12/1998/11).

[88] Note should be taken of the *Revised Recommendation concerning the International Standardisation of Education Statistics* adopted by UNESCO in 1978. The Recommendation proposes definitions and methods of measurement for statistics on illiteracy, educational attainment of the population, enrolment, teachers and educational institutions, and educational finance.

[89] Para. 89 Limburg Principles, see note 72, states in part, "The Committee should take due account of the indicators selected by or in the framework of the specialised agencies and draw upon or promote additional research, in consultation with the specialised agencies concerned, where gaps have been identified".

[90] See 10.4.1. *supra*. See Tomaševski, 2002a, paras. 27–29 (UN Doc. E/CN.4/2002/60), who provides a blueprint for translating the 4–A scheme into indicators based on the right to education. An indicator system to measure the right to education has also been developed by Kempf, 1998, paras. 13–22 (UN Doc. E/C.12/1998/22). The author chooses the three categories of coverage, quality of education and exclusion/inequality for measuring the right to education.

	human rights obligation	human rights-based indicator
availability	• Schools must be established.	• the intake capacity of schools compared to the number of children
	• Teachers must be made available.	• the number of students per teacher
	• An education system must be established and maintained.	• the percentage of the GNP spent on education; • the percentage of the national budget allocated to education
accessibility	• Education must be accessible physically, economically and without discrimination.	• the number of students enrolled compared to the number of children in the age group concerned; • repetition rates; • drop-out rates; • illiteracy rates; • data disaggregated according to different racial groups, gender *etc*.
acceptability	• The quality of education must be ensured.	• the student/teacher ratio;[91] • percentage distribution of population above compulsory school age by educational attainment
	• The right of parents to ensure their children's religious and moral education in conformity with their own convictions must be respected.	• the proportion of schools not established and directed by government
	• The opportunities for instruction in the mother tongue must be maximised.	• the number of classes/ schools teaching/using the mother tongue compared to the number of children speaking the language concerned
	• The contents of textbooks must respect human rights values.	• representation in textbooks of, *e.g.*, women compared to men
	• The learner must be recognised to be the bearer of rights.	• percentage of schools which provide for forms of student participation

[91] World University Service, 1998, para. 12 (UN Doc. E/C.12/1998/15) regards this as the best indicator of quality that can be measured.

(*cont.*)

	human rights obligation	human rights-based indicator
adaptability	• Education must satisfy the educational needs of minority and indigenous communities.	• the number of minority/indigenous educational facilities compared to the number of children belonging to a particular minority/indigenous community
	• It must satisfy the educational needs of disabled children.	• the percentage of disabled children taught in integrated settings, disaggregated by nature of disability
	• It must satisfy the educational needs of working children.	• the percentage of working children taught through programmes which combine school and work

Step 2

The second step entails *the setting of national benchmarks concerning article 13*. This means that each state party would have to set appropriate national levels[92] for each of the selected indicators, taking into account progressive realisation and the use of maximum available resources.[93] The benchmarks thus determined by states parties would have to be mentioned in their reports. The Committee would then, in its dialogue with states parties, comment on the appropriateness of a state party's benchmarks. Where they appear overly modest, it could invite the state party to reconsider. In extreme cases, the Committee could, of its own motion, set higher benchmarks.[94]

Step 3

The third step then entails *the monitoring of national benchmarks concerning article 13*. In its subsequent report, a state party would have to show whether or not it has reached the benchmarks it has set, and refer to problems it has encountered. It would also have to identify new (probably) higher benchmarks for the next reporting period. The Committee would evaluate

[92] The CESCR, in its General Comment No. 1 (Third Session, 1989) [UN Doc. E/1989/22] Reporting by States parties [*Compilation*, 2004, pp. 9–11], states at para. 6 that in many instances "global benchmarks are of limited use, whereas national or other more specific benchmarks can provide an extremely valuable indication of progress".

[93] See Hunt, 1998, para. 13 (UN Doc. E/C.12/1998/11).

[94] See *ibidem* at para. 15.

the state party's progress and, where relevant, make appropriate recommendations. It would also address the state party's new benchmarks. The process would then repeat itself as part of the ongoing reporting procedure.[95]

In sum, the Committee should develop its use of indicators to measure progress with regard to the realisation of article 13. It should select indicators clearly related to the right to education and use these in a structured manner as part of the process of evaluating state reports.[96] It needs to be appreciated, however, that certain aspects of article 13 are difficult to measure with the aid of indicators. It is, for example, difficult to determine whether the freedom aspect of the right to education is guaranteed, by using indicators. Looking at the proportion of public to private schools reflects only part of the picture. It does not reveal whether such freedom is effectively enjoyed in practice.[97] It must also be remembered that indicators usually only show *what* but not *why* something is happening. It is apparent, therefore, that descriptive information remains important in the reporting procedure.[98]

3.1.2.3. *Encouraging the active participation of UNESCO and other UN organs and Specialised Agencies in the supervisory system*[99]

Three years after the ICESCR entered into force, Philip Alston stated:

> the decisive element in determining the success or failure of the Covenant will be the extent to which the UN and the specialised agencies are able to co-operate effectively in its implementation.[100]

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[95] See *ibidem* at paras. 19–20.

[96] The CESCR's reporting guidelines should be amended as appropriate. They should, in particular, include the indicators states parties must use in the reporting process.

[97] See Coomans, 1992, pp. 301–302.

[98] Kempf, 1998, paras. 6–7 (UN Doc. E/C.12/1998/22) thus proposes that state reports present data in the form of an information pyramid. At the top would be a number of key indicators. At the second level, an expanded set of statistics would afford a more in-depth understanding of the forces at work behind the key indicators. At the third level, a further dimension would be added by reporting on selected research studies, such as case studies, programme evaluations and small-scale quantitative studies.

[99] However, not only intergovernmental organisations, but also non-governmental organisations (NGOs) should actively participate in the supervisory system under the ICESCR. NGOs may formulate ideas on the working methods of the CESCR, the discussion of state reports and the realisation of ICESCR rights. So far, rather few NGOs have made use of this opportunity concerning the right to education. International NGOs committed to the right to education are, for example, Education International (EI), the Global Campaign for Education (GCE), the International Organisation for the Development of Freedom of Education (OIDEL) and the World University Service (WUS). The procedure regarding NGO participation in the CESCR's activities has been discussed at 8.4.3. *supra.*

[100] Alston, 1979, pp. 79–118 at p. 79. In this article, Alston discusses the (potential) role of the UN Specialised Agencies in the implementation of the ICESCR. Note should further be taken of para. 92 Limburg Principles, see note 72, which states, "The establishment of

In previous years, only the ILO and, to a lesser extent, UNESCO responded positively to the challenge. The reason for the reluctance of UN organs and Specialised Agencies to actively co-operate in the implementation of the Covenant might have been

> a lack of appreciation of the importance of the Covenant, a fear that involvement in human rights matters will bring unwanted politicisation, an inability to understand the concept of economic rights [or] a concern to protect agency jurisdiction.[101]

In recent years, however, there has been a change of attitude, with UN organs and agencies now willing to co-operate in the implementation of the Covenant in a more active manner. In the years to come, efforts need to be made to render the co-operation of UN organs and agencies with the CESCR more effective, though. The discussion which follows will emphasise the importance of encouraging the active participation of UNESCO—the most important intergovernmental organisation with a mandate on the right to education[102]—in the supervision of the Covenant by the Committee. It makes some suggestions on how UNESCO can contribute more effectively to the supervision of article 13 ICESCR.[103] The discussion must be understood in the light of UNESCO's role concerning the ICESCR, as described in Chapter 6 above.[104]

It has been stated in the preceding section that the Committee should develop its use of indicators to measure progress with regard to the realisation of article 13. Reference should be made to paragraph 94 Limburg Principles[105] in this context, which emphasises that "[i]t is essential for the proper supervision of the implementation of the Covenant . . . that a dialogue be developed between the specialised agencies and the Committee with respect to matters of common interest. In particular consultations should address the need for developing indicators for assessing compliance with the Covenant . . .". UNESCO should help the Committee to select appropriate indicators based on the right to education. On request, it should subsequently help states parties to set realistic national benchmarks for each of the selected indicators. Where a need exists, the agency should then assist states parties in reaching these benchmarks, in monitoring their

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the Committee should be seen as an opportunity to develop a positive and mutually beneficial relationship between the Committee and the specialised agencies and other international organs".

[101] Alston, 1987, p. 367.

[102] Other UN organs and Specialised Agencies whose activities are relevant to the right to education are the ILO, UNICEF, UNDP and the World Bank.

[103] See also Coomans, 1992, pp. 282–290 in this regard.

[104] See 6.2.1.2. *supra.*

[105] See note 72.

progress in this regard, and in reporting on their performance to the Committee. Finally, UNESCO should help the Committee when it considers state reports, *i.e.* when it comments on the appropriateness of state parties' benchmarks and when it monitors national benchmarks concerning article 13.

Article 18 ICESCR states that ECOSOC "may make arrangements with the specialised agencies in respect of their reporting to it on the progress made in achieving the observance of the provisions of the present Covenant falling within the scope of their activities". Such arrangements have, in fact, been made.[106] As far as this writer could ascertain, UNESCO thus far submitted three reports to the Committee on its activities in the sphere of articles 13 to 15 ICESCR.[107] The reports mainly provided information on the legal instruments on education of UNESCO. They further contained information on the realisation of the right to education in states which had ratified the CDE. In this regard, they summarised general trends concerning the implementation of the right to education. All three reports were prepared by UNESCO's Committee on Conventions and Recommendations. UNESCO's contribution to the work of the CESCR may be rendered more effective by developing the reporting mechanism in article 18.[108] UNESCO should prepare a report with regard to each session of the CESCR at which the Committee plans to consider reports submitted by states parties. The report should, in relation to each guarantee of article 13 ICESCR, indicate which UNESCO conventions and recommendations apply to a state party. It should further comment on the extent to which the stated guarantees have been realised in the state party concerned, referring to both the *de iure* and the *de facto* situation, and it should make suggestions on how a state party's performance may be improved, UNESCO basing its statements on data available in the context of its system of monitoring educational standards. The information thus provided should be concrete and detailed. Information of the said nature would significantly help the Committee in assessing the state of realisation of article 13 ICESCR in different states parties.[109]

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[106] See ECOSOC Resolution 1988 (LX) of 11 May 1976.

[107] The reports are contained in UN Docs. E/1982/10, E/1988/7 and E/1990/8.

[108] Note should be taken of para. 93 Limburg Principles, see note 72, which states in part, "New arrangements under article 18 of the Covenant should be considered where they could enhance the contribution of the specialised agencies to the work of the Committee".

[109] See Coomans, 1992, pp. 284–285. The suggested reporting procedure, in fact, largely resembles the reporting procedure followed by the ILO with regard to arts. 6–10 and 13 ICESCR. The ILO's reports are prepared by an independent expert body, the ILO's Committee of Experts on the Application of Conventions and Recommendations. Between 1978 and 2004, the ILO thus prepared 34 reports under art. 18 ICESCR.

For the same reason, a procedure should be created which allows the Committee to approach UNESCO for information with regard to the situation concerning the right to education in any state party. UNESCO would provide the information concerned not of its own motion, but only at the Committee's request. A problem in this respect is that UNESCO's Committee on Conventions and Recommendations, which would likely be the organ assigned the task of providing the information, is not composed of independent experts, but of governmental representatives. These would be reluctant to express themselves critically on the situation concerning the right to education in member states, in order to avoid political confrontation. It is recommended, therefore, that the UNESCO Committee should be re-established as an independent expert body.[110]

It is also important that UNESCO actively participate in the CESCR's discussion of state reports. Rule 68 of the Committee's Rules of Procedure[111] invites the Specialised Agencies to designate representatives to participate at the meetings of the Committee. The representatives "may make statements on matters falling within the scope of the activities of their respective organisations in the course of the discussion by the Committee of the report of each State party to the Covenant".[112] This allows UNESCO representatives to make comments on the reports of states parties and on statements made by governmental representatives in relation to such reports. UNESCO has been represented at all of the Committee's sessions thus far. Previously, it did not participate in the discussion in as active a manner as the ILO.[113] More recently, this has been improving, however.

It is an encouraging sign that the co-operation between UNESCO and the CESCR has grown significantly in the past few years.[114] Reference should be made to developments concerning the creation of a joint UNESCO/CESCR expert group on the right to education.[115] In many ways, the creation of the expert group constitutes follow-up to 30 C/Resolution 15 of 17 November 1999 of the General Conference of UNESCO, which, in

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[110] See Coomans, 1992, pp. 288–290. By way of comparison, the ILO's Committee of Experts on the Application of Conventions and Recommendations, an independent expert body, is competent to provide critical information at the CESCR's request, and has in the past, in fact, done so.

[111] The Rules of Procedure of the CESCR are contained in UN Doc. E/C.12/1990/4/Rev.1.

[112] Note should be taken of para. 94 Limburg Principles, see note 72, which states in part, "Participation of [the specialised agencies'] representatives in meetings of the Committee would be very valuable".

[113] See Gebert, 1996, p. 68.

[114] See 6.2.1.2. *supra.*

[115] The developments concerning the creation of the expert group are summarised in UN Doc. E/2002/22, paras. 1062–1065 and Annex X.

paragraph 12, had requested the study "in co-operation with the United Nations" of "the possibility of creating a coherent mechanism for reporting on and monitoring the right to education as it is set down in various United Nations conventions on human rights".[116] At the invitation of UNESCO's Executive Board, an Informal Meeting on Monitoring the Right to Education: Dialogue between the Committee on Conventions and Recommendations and the Chairperson of the UN Committee on Economic, Social and Cultural Rights, was held at UNESCO on 21 May 2001, for an exchange of experience and ideas, in recognition of the fact that both UNESCO and the CESCR have a mandate with regard to the right to education.[117] At the meeting, the Chairperson of the CESCR proposed institutionalising co-operation with UNESCO and the creation of a joint UNESCO/CESCR expert group to work on issues of common concern arising from the right to education.[118] Following the meeting, UNESCO's Committee on Conventions and Recommendations recommended creating the expert group. UNESCO's Executive Board approved the recommendation at its 162nd session in November 2001.[119] Paragraph 5 of the Executive Board's decision defines the mandate and composition of the expert group as follows:

> Terms of reference
>
> (a) Formulate practical suggestions for strengthening the growing collaboration between UNESCO (Committee on Conventions and Recommendations) and the Economic and Social Council (Committee on Economic, Social and Cultural Rights) for the purpose of monitoring and promoting the right to education in all its dimensions;
> (b) Suggest specific measures for co-operative action by the two bodies with a view to imparting synergy to the follow-up to the Dakar Framework for Action within the United Nations system;
> (c) Consider the possibilities for reducing the reporting burden on States in relation to the right to education and identify ways in which arrangements could be both streamlined and made more effective;
> (d) Advise on right to education indicators.
>
> Composition
>
> The . . . Joint Expert Group shall be composed of two representatives of the Committee on Economic, Social and Cultural Rights nominated by its Chairperson and two representatives of the Committee on Conventions and

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[116] See 6.2.2.1.3.2. *supra.*

[117] For the Summary of Debate, see UNESCO Doc. 161 EX/23 Rev. Annex. Fifteen member states took part in the dialogue. The dialogue was based on an information document prepared by the Secretariat for the Informal Meeting.

[118] See UNESCO Doc. 161 EX/23 Rev. Annex, para. 4.

[119] See UNESCO Doc. 162 EX/Decision 5.4.

Recommendations (CR), nominated by the Chairperson of the Executive Board of UNESCO in consultation with the Chairperson of CR.

The first meeting of the expert group was held on 19 May 2003.[120] The meeting recommended stepping up reciprocal exchange of information, including state reports and feedback on Concluding Observations as well as on decisions of UNESCO's Executive Board.[121] It stressed the need for elaborating quality indicators, starting from an analysis of Education for All (EFA) indicators.[122] Furthermore, it emphasised creating greater awareness about the importance of national laws on the right to education and developing further UNESCO's technical assistance to member states modernising their legislation and administrative processes.[123] The meeting, moreover, recognised that the complementarity between the UNESCO Committee and the CESCR should be strengthened. To reduce the reporting burden on states, consideration should be given to aspects, such as the different reporting cycles and the different ways of reporting of the two bodies.[124] UNESCO's Executive Board subsequently took note of the results of the meeting and requested the expert group to continue discussions on the above matters.[125] In conclusion, the creation of the expert group promises fruitful co-operation between UNESCO and the CESCR and will hopefully lead to concrete improvements in reporting on and monitoring the right to education soon.[126]

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[120] For the report of the meeting, see "Report by the Joint Expert Group UNESCO (CR)/ECOSOC (CESCR) on the monitoring of the right to education", UNESCO Doc. 167 EX/CR.2 (2003). The second meeting of the expert group was held on 3 and 4 May 2004. The report of the meeting was not yet available to the author.

[121] See UNESCO Doc. 167 EX/CR.2 (2003), para. 5, first point.

[122] See *ibidem* at para. 8, second point. On the Education for All (EFA) process, see 7.3. *supra*.

[123] See UNESCO Doc. 167 EX/CR.2 (2003), para. 11, first and third point.

[124] See *ibidem* at para. 14, fourth point.

[125] See UNESCO Doc. 167 EX/Decision 5.8.

[126] It should, finally, be remarked that also the co-operation between the CESCR and the other human rights treaty monitoring bodies needs to be strengthened. Para. 98 Limburg Principles, see note 72, states, for example, that "[i]t is important that consultative arrangements be established between the Economic, Social and Cultural Rights Committee and the Human Rights Committee". See also the interesting suggestion made by Mr. David of the Office of the UNHCHR at the Day of General Discussion on the right to education, held by the CESCR on 30 November 1998. He put forward the proposal that the Committee on the Rights of the Child and the CESCR "might consider holding joint discussion days in the future; the possibility of drafting general comments together; and the creation of a small working group to discuss ways of improving reporting procedures to both treaty bodies, with a view, *inter alia*, to reducing reporting States' workloads". See UN Doc. E/C.12/1998/SR.49, para. 71.

3.2. *The Limits of the System of State Reports and How to Address the Limits*

3.2.1. *The Limits of the System of State Reports*

Above in Chapter 11 it has been stated that the adoption of Concluding Observations by the CESCR constitutes an important method of clarifying the normative content of ICESCR rights. But, it has also been stated that this is a rather cumbersome method of construing Covenant rights.[127] The system of state reports does not facilitate interpreting the rights of the Covenant in an authoritative manner.[128] For this to be possible, it is necessary that a capable body be granted the competence to consider concrete situations in the light of all the facts of the case, within the framework of a judicial or quasi-judicial procedure. Concluding Observations are usually not formulated with regard to concrete situations and subsequent to a thorough examination of all the facts of the case. They are largely based on state reports, which provide a broad overview of the condition of ESCR in a state party and often reflect the government's point of view only.[129]

The system of state reports further offers limited legal protection to individuals and groups who allege that Covenant rights have been infringed. As has been stated above,[130] the function of the system of state reports is not to enable individuals and groups to complain that states parties fail to comply with the Covenant. It is rather to provide a framework within which a "constructive dialogue" between the Committee and states parties may take place, intended to facilitate the realisation of ICESCR rights.

3.2.2. *Adopting an Optional Protocol to the ICESCR Providing for Individual and Group Complaints*

It is submitted that the above limits may be effectively addressed by adopting an Optional Protocol to the ICESCR, providing for individual and group complaints concerning the rights of the ICESCR, to be considered by the CESCR. The complaints procedure would constitute the judicial or quasi-judicial procedure, required to authoritatively interpret article 13 ICESCR and other Covenant provisions, and to strengthen the legal protection offered to individuals and groups who allege that the right to edu-

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[127] See 11.1. *supra.*

[128] Also the CESCR's General Comments and Days of General Discussion do not constitute methods by which to achieve an authoritative interpretation of ICESCR rights, as these formulate legal conclusions of a general nature, which can only be relied upon in a limited sense when adjudging whether or not a certain situation complies with the ICESCR.

[129] See Gebert, 1996, pp. 54–55.

[130] See 12.3.1.1. *supra.*

cation or any other right under the Covenant has been infringed.[131] Such a procedure would further promote the improved enjoyment of ESCR, strengthen the international accountability of states parties, and increase congruence in the legal standing accorded to both international human rights Covenants. The argument sometimes raised against the complaints procedure is that ESCR are supposedly injusticiable. This argument has already been refuted earlier in this book.[132]

Since 1990, the CESCR has considered the issue of an Optional Protocol, providing for individual and group complaints.[133] At its sixth session, in 1991, it supported the drafting of an Optional Protocol, stating that this would enhance the practical implementation of the Covenant.[134] Subsequently, at the World Conference on Human Rights, held at Vienna, Austria from 14 to 25 June 1993, the Committee repeated its support for a complaints procedure, arguing that such a procedure would encourage states parties to provide similar remedies at the domestic level.[135] In paragraph 75 of Part II of the Vienna Declaration and Programme of Action, the Conference backed the idea of an Optional Protocol without reservations and encouraged "the Commission on Human Rights, in co-operation with the Committee on Economic, Social and Cultural Rights, to continue the examination of [an Optional Protocol] to the International Covenant on Economic, Social and Cultural Rights". In accordance with this recommendation, the Committee went about preparing a draft Optional Protocol, which it adopted on 18 December 1996.[136] Since its fifty-third session, in 1997, the Commission on Human Rights has been considering the draft Optional Protocol. For three years running, the Commission received comments and observations from states, and intergovernmental and non-governmental

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[131] The need for an Optional Protocol to the ICESCR, providing for individual and group complaints concerning the rights of the ICESCR, has been emphasised by, for example, Alston, 1991, pp. 79 *et seqq*., Alston, 1993, pp. 115 *et seqq*., Nowak, 1995a, pp. 153–165, Arambulo and Toebes, 1996, pp. 396–416, De Wet, 1997, pp. 514–548 and Arambulo, 1999.

[132] See 3.5. *supra* on the justiciability of ESCR and 9.2.2.5.2. *supra* on the justiciability of the right to education.

[133] On 25 October 1991, Mr. Philip Alston, then Rapporteur of the CESCR, submitted a first discussion paper to the CESCR (see UN Doc. E/C.12/1991/WP.2). In his paper, Mr. Alston arrived at the conclusion that the overriding argument in favour of a complaints procedure was that it provided the only possible means for the international community to develop a body of jurisprudence on ESCR, which was essential if such rights were to be taken seriously (see UN Doc. E/C.12/1991/WP.2, para. 36).

[134] See UN Doc. E/1992/23, para. 362.

[135] See UN Doc. A/CONF.157/PC/62/Add.5, Annex II, para. 24.

[136] See UN Doc. E/CN.4/1997/105, "Draft optional protocol to the International Covenant on Economic, Social and Cultural Rights", which in the Annex contains the "Report of the Committee on Economic, Social and Cultural Rights to the Commission on Human Rights on a draft optional protocol for the consideration of communications in relation to the International Covenant on Economic, Social and Cultural Rights".

organisations on the subject of the draft Optional Protocol.[137] Subsequently, from 2001 until 2003, an independent expert, appointed by the Commission, examined the question of a draft Optional Protocol.[138] In 2003 then, the Commission established an open-ended Working Group on an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, its mandate expiring in 2006, to consider options regarding the elaboration of an Optional Protocol.[139]

The most important provisions of the CESCR's draft Optional Protocol will now be mentioned.

Article 2(1) draft Optional Protocol states:

> Any individual or group claiming to be a victim of a violation by the State party concerned of any of the economic, social or cultural rights recognised in the Covenant, or any individual or group acting on behalf of such claimant(s), may submit a written communication to the [CESCR] for examination.

Article 3 sets out a number of admissibility requirements concerning communications. Amongst others, communications must not be anonymous,[140] they must contain allegations which, if substantiated, would constitute a violation of Covenant rights,[141] all available domestic remedies must have been exhausted,[142] and a communication submitted by or on behalf of the alleged victim which raises essentially the same issues must not be examined under another international procedure.[143] Article 6(3) states that when examining a communication, "the Committee shall place itself at the disposal of the parties concerned with a view to facilitating settlement of the matter on the basis of respect for the rights and obligations set forth in the Covenant". If a settlement is reached, the Committee must prepare a report containing a statement of the facts and of the solution reached.[144] If not,

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[137] The Commission on Human Rights also organised a workshop on the justiciability of ESCR, held on 5 and 6 February 2001. See the report of the workshop, UN Doc. E/CN.4/2001/62/Add.2.

[138] Resolution 2001/30 of 20 April 2001 of the Commission on Human Rights appointed the independent expert, Resolution 2002/24 of 22 April 2002 renewed his mandate for a period of one year. The independent expert submitted reports to the Commission in 2002 and 2003, contained in UN Docs. E/CN.4/2002/57 and E/CN.4/2003/53, respectively.

[139] Resolution 2003/18 of 22 April 2003 of the Commission on Human Rights established the open-ended Working Group on an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, Resolution 2004/29 of 19 April 2004 renewed its mandate for a period of two years. The Working Group submitted a report to the Commission in 2004, on its first session, held from 23 February–5 March 2004, and contained in UN Doc. E/CN.4/2004/44.

[140] Art. 3(1) draft Optional Protocol.

[141] Art. 3(2)(a) draft Optional Protocol.

[142] Art. 3(3)(a) draft Optional Protocol.

[143] Art. 3(3)(b) draft Optional Protocol.

[144] Art. 6(4) draft Optional Protocol.

the Committee must examine the communication in the light of all the information made available to it by or on behalf of the author and by the state party concerned.[145] After examining the communication, the Committee must adopt its views on the claims made and transmit these to the state party concerned and to the author, together with any recommendations it considers appropriate.[146] Where the Committee holds that the state party has violated its obligations under the Covenant, it may recommend that the state party take specific measures to remedy the violation and to prevent its recurrence.[147] Within six months, the state party concerned must provide the Committee with details of the measures it has taken.[148]

The CESCR's draft Optional Protocol provides a good basis on which to give further consideration to the issue of individual and group complaints with regard to ICESCR rights. Pending the adoption of an Optional Protocol, beneficiaries of Covenant rights may utilise what has been termed an "unofficial petition procedure", based on the working methods of the Committee. This matter has been referred to above.[149]

3.2.3. *Violations of the Right to Education*

The CESCR, when considering individual and group complaints, would have to adopt a "violations approach" to ESCR.[150] This means that it would have to decide whether a state party *has violated* any right of the ICESCR. Should it find any such right to have been violated, it would have to make an award of adequate reparation. Paragraph 23 of the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights[151] thus states:

> All victims of violations of economic, social and cultural rights are entitled to adequate reparation, which may take the form of restitution, compensation, rehabilitation and satisfaction or guarantees of non-repetition.

The question, however, is, what amounts to a "violation" of an ESCR—and, in the context of this book—a "violation" of the right to education? The discussion which follows will, therefore, first explain when one can speak of a "violation" of an ESCR. An attempt will then be made to identify "violations" of the right to education. Before doing so, it should be

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[145] Art. 7(1) draft Optional Protocol.
[146] Art. 7(5) draft Optional Protocol.
[147] Art. 8(1) draft Optional Protocol.
[148] Art. 8(2) draft Optional Protocol.
[149] See 8.4.3. *supra*, note 56.
[150] On the matter of a "violations approach" to ESCR, see Chapman, 1995, pp. 23–37, Chapman, 1996, pp. 23–66, Leckie, 1998a, pp. 81–124 and Leckie, 1998b, pp. 35–86.
[151] On the Maastricht Guidelines, see 12.3.2.3.1. *infra.*

emphasised that the CESCR, also when considering state reports, must not hesitate, where relevant, to point out to a state party that a certain situation in the state party *violates* a Covenant right.

3.2.3.1. *The meaning of a "violation" of an economic, social and cultural right*
It is generally accepted that the failure of a state to comply with CPR amounts to a violation of human rights. This being the case, the principle that all human rights are interdependent and indivisible must necessarily mean that also the failure of a state to comply with ESCR amounts to a violation of human rights. It is relatively easy to identify violations of CPR, since compliance with CPR requires states to follow a specific and clearly defined conduct, usually in the form of refraining from unduly interfering with the individual's freedom rights. Violations of ESCR are more difficult to identify. This is so because states must take steps to realise ESCR and have a large measure of discretion in this regard. Another factor is the lack of complaints procedures for ESCR at both the national and the international level, which could have contributed to developing criteria for determining violations of ESCR.

For the purposes of explaining when one can speak of a "violation" of an ESCR, guidance should be sought from the *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, repeatedly referred to in the discussion so far,[152] and further from the *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*.[153] On the occasion of the tenth anniversary of the Limburg Principles, a group of experts met at Maastricht, the Netherlands from 22 to 26 January 1997, to discuss the various ways of defining and identifying violations of ESCR.[154] The meeting formulated the Maastricht Guidelines, which comment on the nature and scope of violations of ESCR and appropriate responses and remedies. Of the Maastricht Guidelines, it has been stated that they constitute "a step forward in the evolution of economic, social and cultural rights in the sense that the notion of violations of these rights is basically accepted".[155]

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[152] On the Limburg Principles, see 9.2. *supra*. The Limburg Principles have been published in the *Human Rights Quarterly*, Vol. 9, 1987, pp. 122–135.

[153] The Maastricht Guidelines have been published in the *Human Rights Quarterly*, Vol. 20, 1998, pp. 691–704. Comments on the Maastricht Guidelines have been made by Dankwa, Flinterman and Leckie, 1998, pp. 705–730.

[154] The meeting of experts was convened by the International Commission of Jurists (Geneva, Switzerland), the Centre for Human Rights of the Faculty of Law of the University of Limburg (Maastricht, the Netherlands) and the Urban Morgan Institute for Human Rights, University of Cincinnati (Cincinnati, Ohio, USA). For a subsequent version of the paper which served as the background paper at the meeting, see Leckie, 1998, pp. 81–124.

[155] Arambulo, 1999, p. 167.

Paragraph 70 Limburg Principles and paragraph 5 Maastricht Guidelines recognise that the failure of a state party to comply with a treaty obligation concerning ESCR is, under international law, a violation of that treaty. A violation of an ESCR may be defined as an act of the state, which is not in compliance with the duties flowing from the ESCR, and for which there exists no reasonable justification. The act concerned may take the form of an act of commission or an act of omission.[156] It is, however, generally agreed that the act must reveal such characteristics, as to move it from the category of "failures to comply with ESCR" to that of "violations of ESCR". It has thus been held that the state should act "intentionally",[157] or that there must be "a lack of political will" on the part of the government to comply with an ESCR.[158] Elsewhere, it has been stated that "situations [must reveal] a species of gross, unmistakable violations of or failures to uphold any [ESCR]".[159] Additionally, in determining whether the act of the state constitutes a violation, it must be borne in mind that states enjoy a margin of discretion in selecting the means for implementing ESCR.[160] Paragraph 72 Limburg Principles states that a state party to the ICESCR will be in violation of the Covenant, *inter alia*, if:

- it fails to take a step which it is required to take by the Covenant;
- it fails to remove promptly obstacles which it is under a duty to remove to permit the immediate fulfilment of a right;
- it fails to implement without delay a right which it is required by the Covenant to provide immediately;
- it wilfully fails to meet a generally accepted international minimum standard of achievement, which is within its powers to meet;
- it applies a limitation to a right recognised in the Covenant other than in accordance with the Covenant;
- it deliberately retards or halts the progressive realisation of a right, unless it is acting within a limitation permitted by the Covenant or it does so due to a lack of available resources or *force majeure*;
- it fails to submit reports as required under the Covenant.[161]

Once the commission of an act of violation has been proved, a *prima facie* case of violation arises. The onus will then be on the state to demonstrate that its act may be reasonably justified. Paragraph 71 Limburg Principles emphasises that "it must be borne in mind that . . . factors beyond [a state's]

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[156] Maastricht Guidelines, paras. 14 and 15.
[157] See Coomans, 1992, pp. 236–237.
[158] See Coomans, 1998b, pp. 141–144.
[159] See the "Report of the independent expert on the question of a draft optional protocol to the International Covenant on Economic, Social and Cultural Rights", contained in UN Doc. E/CN.4/2002/57, para. 34.
[160] Limburg Principles, para. 71 and Maastricht Guidelines, para. 8.
[161] See also the examples of acts of violation listed in paras. 14 and 15 Maastricht Guidelines.

reasonable control may adversely affect its capacity to implement particular rights". A state may show, for example, that a situation of *force majeure* has prevented it from complying with its duties. A state may also show that it has not been able to comply with its duties as a result of a lack of resources. In this case, a state would have to demonstrate that despite using "the maximum of its available resources" (see article 2(1) ICESCR), it has not been able to respect the right at issue. Note should be taken of paragraph 13 Maastricht Guidelines in this regard, which states in part:

> In determining which actions or omissions amount to a violation of an economic, social or cultural right, it is important to distinguish the inability from the unwillingness of a State to comply with its treaty obligations. A State claiming that it is unable to carry out its obligation for reasons beyond its control has the burden of proving that this is the case.

Another possibility, of course, is for a state to show that its act may be justified as a permissible limitation of a right. In this case, it would have to prove that the limitation satisfies all the elements reflected in article 4 ICESCR.[162]

The Maastricht Guidelines state that violations are imputable to the state within whose jurisdiction they occur.[163] The Guidelines also state that states are responsible for violations of ESCR "that result from their failure to exercise due diligence in controlling the behaviour of . . . non-state actors".[164] The Guidelines further accept that states may violate ESCR through acts committed within the framework of their participation in intergovernmental organisations. Also the acts of intergovernmental organisations themselves may violate ESCR.[165]

3.2.3.2. *Identifying "violations" of the right to education*

The claim guiding the present discussion is that the protection of the right to education would be strengthened by the adoption of an Optional Protocol to the ICESCR, providing for a complaints mechanism, giving to the CESCR the competence to determine whether a state party to the Covenant has violated article 13 ICESCR. The Committee would thus have the task of identifying violations of article 13 ICESCR. An attempt will now be made to discern acts which, it is suggested, constitute violations of the right to education.[166] The discussion will be based on some of the categories of

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[162] Art. 4 ICESCR has been discussed at 9.4. *supra.*

[163] Maastricht Guidelines, para. 16.

[164] *Ibidem* at para. 18.

[165] *Ibidem* at para. 19.

[166] Attempts to identify violations of the right to education have also been made by Coomans, 1992, pp. 235–248, Chapman, 1996, pp. 46–65 (based on the categories: violations deriving from governmental actions, laws, and policies; violations based on acts or

acts of violation specified in paragraph 72 Limburg Principles[167] and paragraphs 14 and 15 Maastricht Guidelines.[168]

3.2.3.2.1. *A failure to comply with an aspect of the core content of a right*
It will have to be accepted that, for a claim of an economic, social or cultural nature to be accorded the status of an ESCR, it must give rise to at least certain, minimal state duties. The reference here is to fundamental aspects of a right, core entitlements, which together make up the core content of the right. In view of the fundamental character of the aspects concerned, a failure to comply with an aspect of the core content of a right should be considered a violation of that right.[169] Such views have also been expressed by the CESCR, which, in paragraph 10 General Comment No. 3,[170] observes:

> [T]he Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus . . . a State party in which any significant number of individuals is deprived of essential [economic, social or cultural entitlements] is, *prima facie*, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*.[171]

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policies reflecting discrimination; and violations resulting from the failure to implement a core minimum), Chapman and Russell, 1998 (UN Doc. E/C.12/1998/19) (based on the categories: violations of the obligation to respect; violations of the obligation to protect; and violations of the obligation to fulfil) and Coomans, 1998b, pp. 125–146 (based on the categories mentioned in para. 72 Limburg Principles, see note 152). At 8.4.3. *supra*, it has been explained that the formulations of the section on "Principal subjects of concern" of the CESCR's Concluding Observations indicate, whether an unsatisfactory situation regarding the realisation of a particular Covenant right may be considered to constitute a violation of that right.

[167] See note 152.

[168] See note 153.

[169] Alston, 1987, pp. 352–353 has thus stated, "The fact that there must exist such a core . . . [for ESCR] would seem to be a logical implication of the use of the terminology of rights. In other words, there would be no justification for elevating a 'claim' to the status of a right (with all the connotations that concept is generally assumed to have) if its normative content could be so indeterminate as to allow for the possibility that the rightholders possess no particular entitlement to anything. Each right must therefore give rise to an absolute minimum entitlement, in the absence of which a state party is to be considered to be in violation of its obligations".

[170] CESCR, General Comment No. 3 (Fifth Session, 1990) [UN Doc. E/1991/23] The nature of States parties' obligations (art. 2(1) ICESCR) [*Compilation*, 2004, pp. 15–18].

[171] See also para. 25 Limburg Principles, see note 152, which states, "States parties are obligated, regardless of the level of economic development, to ensure respect for minimum subsistence rights for all".

The Committee's views have subsequently been taken up by the Maastricht Guidelines,[172] which recognise in paragraph 9:

> Violations of the Covenant occur when a State fails to satisfy what the Committee on Economic, Social and Cultural Rights has referred to as "a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights".[173]

Paragraph 9 goes on to state that "[s]uch minimum core obligations apply irrespective of the availability of resources of the country concerned or any other factors and difficulties". Similarly, paragraph 10 provides that ". . . resource scarcity does not relieve States of certain minimum obligations in respect of the implementation of economic, social and cultural rights". What this means is that the failure of a state to comply with an aspect of the core content of a right constitutes a *prima facie* violation of that right. The state will then be called upon to justify its failure. For a state "to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations".[174]

As has been stated, the "core content" of a right covers those aspects of the right which may be described as fundamental, without which the right looses its meaning.[175] With regard to the right to education, the CESCR has held that this refers to "the most basic forms of education".[176] It will now be examined which core entitlements "the most basic forms of education" include.

Fons Coomans has given close attention to the issue of the core content of the right to education.[177] He has identified the following four aspects as forming part of the core content of the right to education:

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[172] See note 153.

[173] See also para. 72 Limburg Principles, see note 152, which states, "A State party will be in violation of the Covenant, *inter alia*, if: . . . it wilfully fails to meet a generally accepted international minimum standard of achievement, which is within its powers to meet . . ." and para. 15(i) Maastricht Guidelines, see note 153, which mentions as an example of a violation of ESCR "[t]he failure to meet a generally accepted international minimum standard of achievement, which is within [a state's] powers to meet".

[174] General Comment No. 3, see note 170, para. 10.

[175] On the notion of the "core content" of a right, notably ESCR, see Arambulo, 1999, pp. 130–136.

[176] General Comment No. 3, see note 170, para. 10.

[177] See Coomans, 1992, pp. 237–239 and pp. 303–304, Coomans, 1995, pp. 16–19, Coomans, 1998b, pp. 134–136 and Coomans, 1998a, paras. 9–16 and paras. 22–24 (UN Doc. E/C.12/1998/16).

- No one must be denied the right to education. In more concrete terms, every person's right of access to the existing public educational institutions without discrimination must be protected.
- Compulsory and free primary education must be available.
- Free choice of education with regard to religious and philosophical convictions must be respected.
- The right to be educated in the language of one's own choice must not be frustrated. This means that the state must not thwart efforts to teach the mother tongue in institutions outside the official system of public education.

The present writer endorses the observations of Coomans, and wishes to elaborate on the four aspects mentioned.

It is submitted that the first aspect Coomans mentions—that of access to the existing public educational institutions without discrimination—may be rendered in more general terms: It may be stated that the absence of "active" discrimination, and measures against "static" discrimination in education form part of the core content of the right to education. Concerning the state's duty to withhold itself from "active" discrimination in education, violations of the right to education would include, for example, denying access to girls/persons belonging to certain ethnic groups *etc*., restrictions concerning the courses they are allowed to take, fewer educational resources, worse educational infrastructure, fewer or less qualified teachers, giving more weight to non-academic subjects, or teaching lower-level or less rigorous science and maths courses.[178] Concerning the state's duty to take measures which address "static" discrimination in education, violations would include, for instance, the state's failure to take steps where girls/persons belonging to certain ethnic groups *etc*. have reduced career horizons because of society's expectation that they do not need a rigorous education, the state's failure to undertake measures against discriminatory treatment in school, or the state's failure to deal with obstacles to academic achievement, such as a lower self-esteem.[179]

The next aspect of the core content is that compulsory and free primary education must be available.[180] Primary education is so important for the development of the individual's abilities that it must be considered to form part of the core content of the right to education. Violations of the right to education would include the absence of legislation requiring pri-

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[178] See Chapman and Russell, 1998, para. 24 (UN Doc. E/C.12/1998/19). The term "active" discrimination has been defined at 6.2.2.1.2.1. *supra*.

[179] See Chapman and Russell, 1998, para. 24 (UN Doc. E/C.12/1998/19). The term "static" discrimination has been defined at 6.2.2.1.2.1. *supra*.

[180] This is subject to the time limits permitted by art. 14 ICESCR.

mary education to be compulsory, school buildings which are in an inadequate condition and poorly equipped, not enough textbooks, teachers with insufficient qualifications, primary schools which are located at too great a distance from students' homes, the charging of school fees, or an unacceptable student/teacher ratio.[181] Also investing disproportionate resources in higher education at the expense of primary education violates the right to education.[182] So does the state's failure to enact or enforce child labour laws.[183] It is submitted that compulsory and free lower secondary education—referring to the first three years of secondary education—should also be held to form part of the core content of the right to education. Education at this level is, likewise, crucial to the development of the individual's abilities. International law confirms this by setting the minimum working age at not less than 15 years, which means that education must be compulsory until this age.[184] It is further submitted that all forms of education for adults which replace primary or lower secondary education, which has not been received or completed, should also be held to form part of the core content of the right to education.[185] Other forms of adult education are not part of the core content. Neither are upper secondary and higher education. But, if in these cases the availability of education is not part of the core content, the duty to adopt and implement a national educational strategy, which includes provision for upper secondary, higher and adult education, is, in fact, part of the core content.

The core content further includes respect for free choice of education as regards religious and philosophical convictions. Violations of the right to education include denying parents' ability to choose their children's schools, or preventing or inhibiting the establishment and operation of private schools where these meet the minimum educational standards laid down by the state.[186] The right to education is also violated where exemptions from religious instruction, requested by parents, are refused. It is further violated where the state does not ensure that teaching in public schools is given in a neutral and objective way. This covers the case of the state which attempts to promote and integrate its political ideas in education.[187]

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[181] See Chapman and Russell, 1998, paras. 27–28 (UN Doc. E/C.12/1998/19).
[182] See *ibidem* at para. 18.
[183] See *ibidem* at para. 21.
[184] See 6.3.2.2. *supra*.
[185] A problem in this regard is that art. 13(2)(d) ICESCR does not require fundamental education to be made *generally* available and *generally* accessible (see 4.3.2. and 10.4.5.2. *supra*), which would seem to contradict the notion that education for adults replacing primary education not received or completed should be held to form part of the core content of the right to education.
[186] See Chapman and Russell, 1998, para. 17 (UN Doc. E/C.12/1998/19).
[187] See Coomans, 1998b, p. 136.

Doing so would be contrary to the aims of education, notably the full development of the human personality. Respect for the aims of education also forms part of the core content.

Finally, education in the language of one's own choice in appropriate circumstances forms part of the core content of the right to education.[188] The right to education is clearly violated where the state thwarts the efforts of minorities to teach their language in institutions outside the official system of public education. It is submitted that also where the state totally refuses to respect the language needs of minorities within the framework of the public education system, as required by the OSCE's Hague Recommendations Regarding the Education Rights of National Minorities,[189] this should be considered a violation of the right to education.[190]

The four aspects which Coomans has identified as forming part of the core content of the right to education have subsequently been accepted at the Day of General Discussion on the right to education, held by the CESCR on 30 November 1998.[191] Mustapha Mehedi suggested, however, that academic freedom should be added to the core content of the right to education.[192] This suggestion should be endorsed.

The CESCR supports the above ideas. In paragraph 57 General Comment No. 13,[193] the Committee thus states:

> [The core content of the right to education] includes an obligation: to ensure the right of access to public educational institutions and programmes on a non-discriminatory basis; to ensure that education conforms to the objectives set out in article 13(1); to provide primary education for all in accordance with article 13(2)(a); to adopt and implement a national educational strategy which includes provision for secondary, higher and fundamental education; and to ensure free choice of education without interference from the State or third parties, subject to conformity with "minimum educational standards" (art. 13(3) and (4)).

In paragraph 59 General Comment No. 13 then, the Committee mentions examples of what it considers violations of the right to education:

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[188] After all, as a cultural right, the very purpose of the right to education is to strengthen the individual's identity, *i.e.* his cultural, and as part thereof, his linguistic identity. See 2.8. *supra*.

[189] The OSCE's Hague Recommendations Regarding the Education Rights of National Minorities have been discussed at 9.3.3.3.3.2. *supra*.

[190] The Hague Recommendations consider multilingualism in education, *i.e.* a specific mix of minority and state language at the various levels of education, to constitute a realistic interpretation of international law. See 9.3.3.3.3.2. (multilingualism) *supra*.

[191] See UN Doc. E/1999/22, paras. 490–494. On the Day of General Discussion on the right to education, see 8.5.1. *supra*.

[192] See UN Doc. E/1999/22, para. 496.

[193] See note 41.

> By way of illustration, violations of article 13 include: the introduction or failure to repeal legislation which discriminates against individuals or groups, on any of the prohibited grounds, in the field of education; the failure to take measures which address *de facto* educational discrimination; the use of curricula inconsistent with the educational objectives set out in article 13(1); the failure to maintain a transparent and effective system to monitor conformity with article 13(1); the failure to introduce, as a matter of priority, primary education which is compulsory and available free to all; the failure to take "deliberate, concrete and targeted" measures towards the progressive realisation of secondary, higher and fundamental education in accordance with article 13(2)(b)–(d); the prohibition of private educational institutions; the failure to ensure private educational institutions conform to the "minimum educational standards" required by article 13(3) and (4); the denial of academic freedom of staff and students; the closure of educational institutions in times of political tension in non-conformity with article 4.

It will be noted that all the aspects of the core content of the right to education, identified by the Committee in paragraph 57, may be found among the examples of violations, in the form of non-compliance with the said aspects. This means that the Committee considers non-compliance with these aspects violations of the right to education.

3.2.3.2.2. *A failure to take a step which a state party is obliged to take under the ICESCR*[194]

Paragraph 72 Limburg Principles[195] states that "[a] State party will be in violation of the Covenant, *inter alia*, if: it fails to take a step which it is required to take by the Covenant . . .". Similarly, paragraph 15(a) Maastricht Guidelines[196] mentions as an example of a violation of ESCR "[t]he failure to take appropriate steps as required under the Covenant". Article 2(1) ICESCR calls upon states parties "to take steps . . . with a view to achieving progressively the full realisation of the rights recognised in the . . . Covenant". The CESCR has interpreted this as meaning that such steps "must be taken within a reasonably short time after the Covenant's entry into force for the States concerned" and that they "should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognised in the Covenant".[197] The Committee has repeated these considerations for the right to education in article 13 ICESCR in General Comment No. 13.[198] Accordingly, a state party which fails to take immediate

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[194] On violations of the right to education in this category, see Coomans, 1998b, pp. 128–129.
[195] See note 152.
[196] See note 153.
[197] General Comment No. 3, see note 170, para. 2.
[198] General Comment No. 13, see note 41, para. 43.

steps, which are deliberate, concrete and clearly targeted towards realising article 13, violates the right to education.

An example of a step prescribed by the Covenant is article 14 ICESCR. Under article 14, each state party to the Covenant which, at the time of becoming a party, has not been able to secure compulsory and free primary education, undertakes to work out and adopt, within two years, a detailed plan of action for the progressive implementation of compulsory and free primary education. This provision prescribes specific conduct. A state party which fails to adopt the stated plan of action within the two-year timetable thus violates the right to education.[199] But, there are also other cases in which the Covenant obliges states parties to take steps. Paragraph 52 General Comment No. 13,[200] for example, states that, in relation to article 13(2)(b) to (d) ICESCR, "a State party has an immediate obligation 'to take steps' . . . towards the realisation of secondary, higher and fundamental education for all those within its jurisdiction". Therefore, a state party which does not, at a minimum, adopt and implement a national educational strategy, which includes the provision of secondary, higher and fundamental education, violates the right to education.

3.2.3.2.3. *A failure to remove promptly obstacles which a state party is under a duty to remove to permit the immediate fulfilment of a right*[201]

Paragraph 72 Limburg Principles[202] states that "[a] State party will be in violation of the Covenant, *inter alia*, if: . . . it fails to remove promptly obstacles which it is under a duty to remove to permit the immediate fulfilment of a right . . .".[203] The reference here is to situations where a state party, in pursuance of a clear policy, does not remove legal or administrative provisions which clearly conflict with a right under the ICESCR. Naturally, if the wilful failure to remove such obstacles violates ESCR, so must the wilful establishment of such obstacles. Paragraph 14(b) Maastricht Guidelines[204] thus states that ESCR are violated by "[t]he active denial of such rights to particular individuals or groups, whether through legislated or enforced discrimination".

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[199] See Chapman and Russell, 1998, para. 30 (UN Doc. E/C.12/1998/19).

[200] See note 41.

[201] On violations of the right to education in this category, see Coomans, 1998b, pp. 129–132.

[202] See note 152.

[203] Similarly, para. 15(g) Maastricht Guidelines, see note 153, mentions as an example of a violation of ESCR "[t]he failure to remove promptly obstacles which [a state] is under a duty to remove to permit the immediate fulfilment of a right guaranteed by the Covenant".

[204] See note 153.

Under the present category, article 13 ICESCR will be violated, in particular, through forms of "active" discrimination in the sphere of education. "Active" discrimination refers to discrimination which flows from state action, evidently intended to originate, maintain or aggravate inequality. Measures against "active" discrimination must be taken immediately.[205] The right to education would thus be violated where a state party adopts legislation which seeks to deprive certain groups of persons of access to education, to limit them to education of an inferior standard, or to establish or maintain separate educational systems or institutions for these groups.[206] The failure to remove any such legislation already in existence, would, similarly, violate the right to education.

3.2.3.2.4. *A failure to implement without delay a right which a state party is obliged to provide immediately under the ICESCR*[207]

Paragraph 72 Limburg Principles[208] states that "[a] State party will be in violation of the Covenant, *inter alia*, if: . . . it fails to implement without delay a right which it is required by the Covenant to provide immediately . . .".[209] To the extent that ICESCR rights entail obligations to respect, they must be provided immediately. Obligations to respect are negative in nature and do not depend on resources.[210] A failure to implement rights at this level without delay, therefore, violates ESCR. To mention an example in relation to article 13 ICESCR, a state party would thus violate the right to education if it did not guarantee without delay the absence of corporal punishment in schools.[211] Nevertheless, also obligations to fulfil—which are positive in nature and depend on resources—must be provided within a limited period of time in certain cases under the Covenant. It has been stated on more than one occasion that there exists a high degree of urgency of realisation for compulsory and free primary education, protected in article 13(2)(a).[212] Thus, a state party which fails to guarantee compulsory and free primary education within a short period of time, violates the right to education.

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[205] On "active" discrimination, see 6.2.2.1.2.1. *supra.*

[206] These forms of "active" discrimination are mentioned in art. 1(1) CDE.

[207] On violations of the right to education in this category, see Coomans, 1998b, pp. 132–134.

[208] See note 152.

[209] Similarly, para. 15(h) Maastricht Guidelines, see note 153, mentions as an example of a violation of ESCR "[t]he failure to implement without delay a right which [a state] is required by the Covenant to provide immediately".

[210] On the notion that human rights entail obligations to respect, protect and fulfil, see 3.4.2. *supra.*

[211] On the legitimacy of corporal punishment in the context of art. 13 ICESCR, see 10.4.1.3.2. *supra.*

[212] See 4.3.2., 9.2.2.4. and 10.4.2.4. *supra.*

3.2.3.2.5. *Deliberately retarding or halting the progressive realisation of a right, or deliberately taking retrogressive measures*[213]

Paragraph 72 Limburg Principles[214] states that "[a] State party will be in violation of the Covenant, *inter alia*, if: . . . it deliberately retards or halts the progressive realisation of a right, unless it is acting within a limitation permitted by the Covenant or it does so due to a lack of available resources or *force majeure* . . .".[215] Implicitly, this paragraph also embodies the idea that deliberately reversing existing levels of realisation of a right, without sufficient justification, constitutes a violation of the right concerned. It is for this reason that the Maastricht Guidelines mention "[t]he adoption of any deliberately retrogressive measure that reduces the extent to which any such right is guaranteed" as an example of a violation of ESCR.[216]

The topic of deliberately retrogressive measures has been dealt with above, when discussing the obligation of states parties to achieve progressively the full realisation of the rights of the ICESCR.[217]

In the past, the CESCR has been reluctant to speak of violations in the context of deliberately retrogressive measures. One must agree with Craven, however, who argues:

> Certainly some adverse effects may flow from well-intentioned measures, but where retrogressive measures were the result of deliberate policy, the Committee would do better to consider it a *prima facie* violation of the Covenant in the absence of further justificatory evidence. It would then be for the State concerned to show that there were sound reasons for adopting the policy at issue.[218]

Likewise, if a state party has deliberately retarded or halted the progressive realisation of a Covenant right, this should be considered a violation, unless the state party can present a sufficient justification. A state party may attempt to justify its action of retarding or halting progressive realisation, or of taking retrogressive measures, by demonstrating that it is acting within a limitation permitted by the Covenant (article 4), that it experi-

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[213] On violations of the right to education in this category, see Coomans, 1998b, pp. 136–141.

[214] See note 152.

[215] Similarly, para. 14(f) Maastricht Guidelines, see note 153, mentions as an example of a violation of ESCR "[t]he calculated obstruction of, or halt to, the progressive realisation of a right protected by the Covenant, unless the State is acting within a limitation permitted by the Covenant or it does so due to a lack of available resources or *force majeure*".

[216] Maastricht Guidelines, see note 153, para. 14(e).

[217] See 9.2.2.4. *supra*. The topic of deliberately retrogressive measures has also been dealt with, when discussing judicial remedies and justiciability in relation to the rights of the ICESCR (see 9.2.2.5.2. *supra*), and when discussing the limitation of ICESCR rights (see 9.4. *supra*).

[218] Craven, 1995, p. 132.

ences a lack of available resources (article 2(1)), or that there exists a situation of *force majeure*. The CESCR also states that a state party may justify its action "by reference to the totality of the rights provided for in the Covenant", or, alternatively, "in the context of the full use of the maximum available resources".[219] In the case of all of the above grounds of justification, a state party would additionally have to show that programmes have been or will be adopted to protect vulnerable members of society.[220]

Violations of article 13 ICESCR under the present category include the failure of a state party to make secondary or higher education progressively free, the introduction or increase of study fees at the secondary or higher level of education,[221] or reducing the budget for education, provided the state party acts deliberately. A state party will escape liability, however, if it can prove any of the above grounds of justification. But, even in that case, article 13 will have been violated, if the state party does not also prove that measures have been taken to protect the educational access of vulnerable members of society.[222]

3.2.3.2.6. *A failure to fulfil the obligation to progressively realise a right*[223]
Under the previous heading, it has been stated that a state party, which deliberately retards or halts the progressive realisation of the right to education, violates that right. But, what about the state party which does not make advances in the progressive realisation of the right to education, but where this is not the result of a deliberate policy pursued by the state party concerned, but of other factors? A state party may, for example, follow an unsatisfactory policy. There may also be a severe lack of resources. It must be agreed with Coomans that in this type of situation one should not speak of "a violation" of the right to education, but rather of "a failure to comply with" that right. In the case of both "violation" and "failure", a state party does not satisfy the "obligation to fulfil", imposed in terms of article 2(1) ICESCR. In the former case, however, the state party lacks the political will to satisfy the obligation, whereas, in the latter case, the

[219] General Comment No. 3, see note 170, para. 9 and General Comment No. 13, see note 41, para. 45.
[220] General Comment No. 3, see note 170, para. 12.
[221] Reporting on the Day of General Discussion on the right to education, held by the CESCR on 30 November 1998, in the Report on the Eighteenth and Nineteenth Sessions, contained in UN Doc. E/1999/22, the Committee states at para. 507 that "any step back taken by a State, for example by substantially increasing tuition fees or by introducing fees in public schooling institutions so far free of charge, would constitute a violation of the Covenant".
[222] See Chapman and Russell, 1998, paras. 32–33 (UN Doc. E/C.12/1998/19).
[223] Regarding this matter, see Coomans, 1998b, pp. 141–144.

state party is willing to satisfy the obligation, but fails to do so for other reasons.

3.2.4. *Conclusion*

Whereas CPR are generally accepted, ambivalence towards ESCR remains commonplace. When a person is tortured, when he is denied the right to speak freely, or when his religious freedom is restricted, observers usually react with outrage, and claim that the responsible state should be held accountable. In contrast, when people are deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education, more tolerance is commonly displayed. Nameless economic or other forces are then blamed for the misery, and no attempt is made to hold the state liable. Often, however, such misery may well be blamed upon the state. In many cases, it is the result of a manifest policy pursued by the state concerned. In other cases, it is the consequence of a grossly negligent dereliction by the state of its duty to take steps aimed at improving the economic, social and cultural circumstances of the population. If ESCR are to be taken seriously, a "violations approach" to these rights needs to be adopted. If it is appreciated that civil and political as well as economic, social and cultural claims constitute basic human needs, which are based on human dignity, then, in the same way that non-compliance with CPR is considered a violation of CPR, non-compliance with ESCR should, in relevant situations, be considered a violation of ESCR. The adoption of a "violations approach" would be of significance. Certainly, no state would like to be labelled a human rights violator. States would, therefore, make a special effort to comply with international standards concerning ESCR. At a more tangible level, adopting a "violations approach" would entail access to remedies for individuals whose ESCR have been violated, and the award of adequate reparation to them. At 12.3.2.2. above, it has been argued that an Optional Protocol to the ICESCR should be adopted, providing for individual and group complaints with regard to the rights of the ICESCR, to be considered by the CESCR.

All these considerations apply with equal force to the right to education, as laid down in, for example, article 13 ICESCR. Non-compliance with the right to education should, in appropriate cases, be considered a violation of that right. The adoption of a "violations approach" should motivate states to comply with the right to education. Where a state violates the right to education nevertheless, the aggrieved individual should have access to suitable remedies at both the local and the international level, directed at obtaining adequate reparation. At the international level,

this should include the possibility of submitting complaints under an Optional Protocol to the ICESCR. In the above discussion, it has been sought to mention cases of what may be considered violations of the right to education. The road forward must be to develop a sound conceptual framework for identifying violations of ESCR, and, then, to draw up a detailed inventory of individual instances of violations of the right to education. In the performance of this task, it needs to be clearly distinguished between instances of "non-compliance" with and instances of "violations" of ESCR/the right to education. In other words, attention must be given to that element—whether it be the fact that the state acted deliberately, that there was a lack of political will on the part of the government concerned, or that the failure to comply with the right at issue was of a gross and unmistakable nature—which moves the act of a state from the category of "non-compliance" with to that of "violations" of ESCR/the right to education. Thus, important research remains to be done on the topic of the "violations approach". Future researchers on ESCR and the right to education should not hesitate to carry out that research!

ANNEX

1. *General Comment No. 11 of the Committee on Economic, Social and Cultural Rights: Plans of action for primary education (art. 14 ICESCR)*

(Twentieth Session, 1999) [UN Doc. E/2000/22]

1. Article 14 of the International Covenant on Economic, Social and Cultural Rights requires each State party which has not been able to secure compulsory primary education, free of charge, to undertake, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory primary education free of charge for all. In spite of the obligations undertaken in accordance with article 14, a number of States parties have neither drafted nor implemented a plan of action for free and compulsory primary education.

2. The right to education, recognised in articles 13 and 14 of the Covenant, as well as in a variety of other international treaties, such as the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination against Women, is of vital importance. It has been variously classified as an economic right, a social right and a cultural right. It is all of these. It is also, in many ways, a civil right and a political right, since it is central to the full and effective realisation of those rights as well. In this respect, the right to education epitomises the indivisibility and interdependence of all human rights.

3. In line with its clear and unequivocal obligation under article 14, every State party is under a duty to present to the Committee a plan of action drawn up along the lines specified in paragraph 8 below. This obligation needs to be scrupulously observed in view of the fact that in developing countries, 130 million children of school age are currently estimated to be without access to primary education, of whom about two thirds are girls.[1] The Committee is fully aware that many diverse factors have made it difficult for States parties to fulfil their obligation to provide a plan of action. For example, the structural adjustment programmes that began in

[1] See generally UNICEF, *The State of the World's Children* 1999.

the 1970s, the debt crises that followed in the 1980s and the financial crises of the late 1990s, as well as other factors, have greatly exacerbated the extent to which the right to primary education is being denied. These difficulties, however, cannot relieve States parties of their obligation to adopt and submit a plan of action to the Committee, as provided for in article 14 of the Covenant.

4. Plans of action prepared by States parties to the Covenant in accordance with article 14 are especially important as the work of the Committee has shown that the lack of educational opportunities for children often reinforces their subjection to various other human rights violations. For instance these children, who may live in abject poverty and not lead healthy lives, are particularly vulnerable to forced labour and other forms of exploitation. Moreover, there is a direct correlation between, for example, primary school enrolment levels for girls and major reductions in child marriages.

5. Article 14 contains a number of elements which warrant some elaboration in the light of the Committee's extensive experience in examining State party reports.

6. *Compulsory*. The element of compulsion serves to highlight the fact that neither parents, nor guardians, nor the State are entitled to treat as optional the decision as to whether the child should have access to primary education. Similarly, the prohibition of gender discrimination in access to education, required also by articles 2 and 3 of the Covenant, is further underlined by this requirement. It should be emphasised, however, that the education offered must be adequate in quality, relevant to the child and must promote the realisation of the child's other rights.

7. *Free of charge*. The nature of this requirement is unequivocal. The right is expressly formulated so as to ensure the availability of primary education without charge to the child, parents or guardians. Fees imposed by the Government, the local authorities or the school, and other direct costs, constitute disincentives to the enjoyment of the right and may jeopardise its realisation. They are also often highly regressive in effect. Their elimination is a matter which must be addressed by the required plan of action. Indirect costs, such as compulsory levies on parents (sometimes portrayed as being voluntary, when in fact they are not), or the obligation to wear a relatively expensive school uniform, can also fall into the same category. Other indirect costs may be permissible, subject to the Committee's examination on a case-by-case basis. This provision of compulsory primary

education in no way conflicts with the right recognised in article 13(3) of the Covenant for parents and guardians "to choose for their children schools other than those established by the public authorities".

8. *Adoption of a detailed plan.* The State party is required to adopt a plan of action within two years. This must be interpreted as meaning within two years of the Covenant's entry into force of the State concerned, or within two years of a subsequent change in circumstances which has led to the non-observance of the relevant obligation. This obligation is a continuing one and States parties to which the provision is relevant by virtue of the prevailing situation are not absolved from the obligation as a result of their past failure to act within the two-year limit. The plan must cover all of the actions which are necessary in order to secure each of the requisite component parts of the right and must be sufficiently detailed so as to ensure the comprehensive realisation of the right. Participation of all sections of civil society in the drawing up of the plan is vital and some means of periodically reviewing progress and ensuring accountability are essential. Without those elements, the significance of the article would be undermined.

9. *Obligations.* A State party cannot escape the unequivocal obligation to adopt a plan of action on the grounds that the necessary resources are not available. If the obligation could be avoided in this way, there would be no justification for the unique requirement contained in article 14 which applies, almost by definition, to situations characterised by inadequate financial resources. By the same token, and for the same reason, the reference to "international assistance and co-operation" in article 2(1) and to "international action" in article 23 of the Covenant are of particular relevance in this situation. Where a State party is clearly lacking in the financial resources and/or expertise required to "work out and adopt" a detailed plan, the international community has a clear obligation to assist.

10. *Progressive implementation.* The plan of action must be aimed at securing the progressive implementation of the right to compulsory primary education, free of charge, under article 14. Unlike the provision in article 2(1), however, article 14 specifies that the target date must be "within a reasonable number of years" and, moreover, that the time-frame must "be fixed in the plan". In other words, the plan must specifically set out a series of targeted implementation dates for each stage of the progressive implementation of the plan. This underscores both the importance and the relative inflexibility of the obligation in question. Moreover, it needs to be

stressed in this regard that the State party's other obligations, such as non-discrimination, are required to be implemented fully and immediately.

11. The Committee calls upon every State party to which article 14 is relevant to ensure that its terms are fully complied with and that the resulting plan of action is submitted to the Committee as an integral part of the reports required under the Covenant. Further, in appropriate cases, the Committee encourages States parties to seek the assistance of relevant international agencies, including the International Labour Organisation (ILO), the United Nations Development Programme (UNDP), the United Nations Educational, Scientific and Cultural Organisation (UNESCO), the United Nations Children's Fund (UNICEF), the International Monetary Fund (IMF) and the World Bank, in relation both to the preparation of plans of action under article 14 and their subsequent implementation. The Committee also calls upon the relevant international agencies to assist States parties to the greatest extent possible to meet their obligations on an urgent basis.

2. *General Comment No. 13 of the Committee on Economic, Social and Cultural Rights: The right to education (art. 13 ICESCR)*

(Twenty-First Session, 1999) [UN Doc. E/2000/22]

1. Education is both a human right in itself and an indispensable means of realising other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalised adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognised as one of the best financial investments States can make. But the importance of education is not just practical: a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence.

2. The International Covenant on Economic, Social and Cultural Rights (ICESCR) devotes two articles to the right to education, articles 13 and 14. Article 13, the longest provision in the Covenant, is the most wide-ranging and comprehensive article on the right to education in international human

rights law. The Committee has already adopted General Comment 11 on article 14 (plans of action for primary education); General Comment 11 and the present general comment are complementary and should be considered together. The Committee is aware that for millions of people throughout the world, the enjoyment of the right to education remains a distant goal. Moreover, in many cases, this goal is becoming increasingly remote. The Committee is also conscious of the formidable structural and other obstacles impeding the full implementation of article 13 in many States parties.

3. With a view to assisting States parties' implementation of the Covenant and the fulfilment of their reporting obligations, this general comment focuses on the normative content of article 13 (Part I, paras. 4–42), some of the obligations arising from it (Part II, paras. 43–57), and some illustrative violations (Part II, paras. 58–59). Part III briefly remarks upon the obligations of actors other than States parties. The general comment is based upon the Committee's experience in examining States parties' reports over many years.

I. Normative content of article 13

Article 13(1): Aims and objectives of education

4. States parties agree that all education, whether public or private, formal or non-formal, shall be directed towards the aims and objectives identified in article 13(1). The Committee notes that these educational objectives reflect the fundamental purposes and principles of the United Nations as enshrined in Articles 1 and 2 of the Charter. For the most part, they are also found in article 26(2) of the Universal Declaration of Human Rights, although article 13(1) adds to the Declaration in three respects: education shall be directed to the human personality's "sense of dignity", it shall "enable all persons to participate effectively in a free society", and it shall promote understanding among all "ethnic" groups, as well as nations and racial and religious groups. Of those educational objectives which are common to article 26(2) of the Universal Declaration of Human Rights and article 13(1) of the Covenant, perhaps the most fundamental is that "education shall be directed to the full development of the human personality".

5. The Committee notes that since the General Assembly adopted the Covenant in 1966, other international instruments have further elaborated

the objectives to which education should be directed. Accordingly, the Committee takes the view that States parties are required to ensure that education conforms to the aims and objectives identified in article 13(1), as interpreted in the light of the World Declaration on Education for All (Jomtien, Thailand, 1990) (art. 1), the Convention on the Rights of the Child (art. 29(1)), the Vienna Declaration and Programme of Action (Part I, para. 33 and Part II, para. 80), and the Plan of Action for the United Nations Decade for Human Rights Education (para. 2). While all these texts closely correspond to article 13(1) of the Covenant, they also include elements which are not expressly provided for in article 13(1), such as specific references to gender equality and respect for the environment. These new elements are implicit in, and reflect a contemporary interpretation of article 13(1). The Committee obtains support for this point of view from the widespread endorsement that the previously mentioned texts have received from all regions of the world.[1]

Article 13(2): The right to receive an education—some general remarks

6. While the precise and appropriate application of the terms will depend upon the conditions prevailing in a particular State party, education in all its forms and at all levels shall exhibit the following interrelated and essential features:[2]

(a) *Availability*—functioning educational institutions and programmes have to be available in sufficient quantity within the jurisdiction of the State party. What they require to function depends upon numerous factors, including the developmental context within which they operate; for

[1] The World Declaration on Education for All was adopted by 155 governmental delegations; the Vienna Declaration and Programme of Action was adopted by 171 governmental delegations; the Convention on the Rights of the Child has been ratified or acceded to by 191 States parties; the Plan of Action of the United Nations Decade for Human Rights Education was adopted by a consensus resolution of the General Assembly (49/184).

[2] This approach corresponds with the Committee's analytical framework adopted in relation to the rights to adequate housing and food, as well as the work of the United Nations Special Rapporteur on the right to education. In its General Comment 4, the Committee identified a number of factors which bear upon the right to adequate housing, including "availability", "affordability", "accessibility" and "cultural adequacy". In its General Comment 12, the Committee identified elements of the right to adequate food, such as "availability", "acceptability" and "accessibility". In her preliminary report to the Commission on Human Rights, the Special Rapporteur on the right to education sets out "four essential features that primary schools should exhibit, namely availability, accessibility, acceptability and adaptability", (E/CN.4/1999/49, para. 50).

example, all institutions and programmes are likely to require buildings or other protection from the elements, sanitation facilities for both sexes, safe drinking water, trained teachers receiving domestically competitive salaries, teaching materials, and so on; while some will also require facilities such as a library, computer facilities and information technology;

(b) *Accessibility*—educational institutions and programmes have to be accessible to everyone, without discrimination, within the jurisdiction of the State party. Accessibility has three overlapping dimensions:

(i) Non-discrimination—education must be accessible to all, especially the most vulnerable groups, in law and fact, without discrimination on any of the prohibited grounds (see paras. 31–37 on non-discrimination);

(ii) Physical accessibility—education has to be within safe physical reach, either by attendance at some reasonably convenient geographic location (*e.g.* a neighbourhood school) or via modern technology (*e.g.* access to a "distance learning" programme);

(iii) Economic accessibility—education has to be affordable to all. This dimension of accessibility is subject to the differential wording of article 13(2) in relation to primary, secondary and higher education: whereas primary education shall be available "free to all", States parties are required to progressively introduce free secondary and higher education;

(c) *Acceptability*—the form and substance of education, including curricula and teaching methods, have to be acceptable (*e.g.* relevant, culturally appropriate and of good quality) to students and, in appropriate cases, parents; this is subject to the educational objectives required by article 13(1) and such minimum educational standards as may be approved by the State (see art. 13(3) and (4));

(d) *Adaptability*—education has to be flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings.

7. When considering the appropriate application of these "interrelated and essential features" the best interests of the student shall be a primary consideration.

Article 13(2)(a): The right to primary education

8. Primary education includes the elements of availability, accessibility, acceptability and adaptability which are common to education in all its forms and at all levels.[3]

9. The Committee obtains guidance on the proper interpretation of the term "primary education" from the World Declaration on Education for All which states: "The main delivery system for the basic education of children outside the family is primary schooling. Primary education must be universal, ensure that the basic learning needs of all children are satisfied, and take into account the culture, needs and opportunities of the community" (art. 5). "[B]asic learning needs" are defined in article 1 of the World Declaration.[4] While primary education is not synonymous with basic education, there is a close correspondence between the two. In this regard, the Committee endorses the position taken by UNICEF: "Primary education is the most important component of basic education."[5]

10. As formulated in article 13(2)(a), primary education has two distinctive features: it is "compulsory" and "available free to all". For the Committee's observations on both terms, see paragraphs 6 and 7 of General Comment 11 on article 14 of the Covenant.

Article 13(2)(b): The right to secondary education

11. Secondary education includes the elements of availability, accessibility, acceptability and adaptability which are common to education in all its forms and at all levels.[6]

12. While the content of secondary education will vary among States parties and over time, it includes completion of basic education and consolidation of the foundations for life-long learning and human development. It prepares students for vocational and higher educational opportunities.[7]

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[3] See para. 6.

[4] The Declaration defines "basic learning needs" as: "essential learning tools (such as literacy, oral expression, numeracy, and problem solving) and the basic learning content (such as knowledge, skills, values, and attitudes) required by human beings to be able to survive, to develop their full capacities, to live and work in dignity, to participate fully in development, to improve the quality of their lives, to make informed decisions, and to continue learning" (art. 1).

[5] Advocacy Kit, Basic Education 1999 (UNICEF), section 1, p. 1.

[6] See para. 6.

[7] See International Standard Classification of Education 1997, UNESCO, para. 52.

Article 13(2)(b) applies to secondary education "in its different forms", thereby recognising that secondary education demands flexible curricula and varied delivery systems to respond to the needs of students in different social and cultural settings. The Committee encourages "alternative" educational programmes which parallel regular secondary school systems.

13. According to article 13(2)(b), secondary education "shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education". The phrase "generally available" signifies, firstly, that secondary education is not dependent on a student's apparent capacity or ability and, secondly, that secondary education will be distributed throughout the State in such a way that it is available on the same basis to all. For the Committee's interpretation of "accessible", see paragraph 6 above. The phrase "every appropriate means" reinforces the point that States parties should adopt varied and innovative approaches to the delivery of secondary education in different social and cultural contexts.

14. "[P]rogressive introduction of free education" means that while States must prioritise the provision of free primary education, they also have an obligation to take concrete steps towards achieving free secondary and higher education. For the Committee's general observations on the meaning of the word "free", see paragraph 7 of General Comment 11 on article 14.

Technical and vocational education

15. Technical and vocational education (TVE) forms part of both the right to education and the right to work (art. 6(2)). Article 13(2)(b) presents TVE as part of secondary education, reflecting the particular importance of TVE at this level of education. Article 6(2), however, does not refer to TVE in relation to a specific level of education; it comprehends that TVE has a wider role, helping "to achieve steady economic, social and cultural development and full and productive employment". Also, the Universal Declaration of Human Rights states that "[t]echnical and professional education shall be made generally available" (art. 26(1)). Accordingly, the Committee takes the view that TVE forms an integral element of all levels of education.[8]

[8] A view also reflected in the Human Resources Development Convention 1975 (Convention No. 142) and the Social Policy (Basic Aims and Standards) Convention 1962 (Convention No. 117) of the International Labour Organisation.

16. An introduction to technology and to the world of work should not be confined to specific TVE programmes but should be understood as a component of general education. According to the UNESCO Convention on Technical and Vocational Education (1989), TVE consists of "all forms and levels of the educational process involving, in addition to general knowledge, the study of technologies and related sciences and the acquisition of practical skills, know-how, attitudes and understanding relating to occupations in the various sectors of economic and social life" (art. 1(a)). This view is also reflected in certain ILO Conventions.[9] Understood in this way, the right to TVE includes the following aspects:

(a) It enables students to acquire knowledge and skills which contribute to their personal development, self-reliance and employability and enhances the productivity of their families and communities, including the State party's economic and social development;

(b) It takes account of the educational, cultural and social background of the population concerned; the skills, knowledge and levels of qualification needed in the various sectors of the economy; and occupational health, safety and welfare;

(c) Provides retraining for adults whose current knowledge and skills have become obsolete owing to technological, economic, employment, social or other changes;

(d) It consists of programmes which give students, especially those from developing countries, the opportunity to receive TVE in other States, with a view to the appropriate transfer and adaptation of technology;

(e) It consists, in the context of the Covenant's non-discrimination and equality provisions, of programmes which promote the TVE of women, girls, out-of-school youth, unemployed youth, the children of migrant workers, refugees, persons with disabilities and other disadvantaged groups.

Article 13(2)(c): The right to higher education

17. Higher education includes the elements of availability, accessibility, acceptability and adaptability which are common to education in all its forms at all levels.[10]

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[9] See note 8.
[10] See para. 6.

18. While article 13(2)(c) is formulated on the same lines as article 13(2)(b), there are three differences between the two provisions. Article 13(2)(c) does not include a reference to either education "in its different forms" or specifically to TVE. In the Committee's opinion, these two omissions reflect only a difference of emphasis between article 13(2)(b) and (c). If higher education is to respond to the needs of students in different social and cultural settings, it must have flexible curricula and varied delivery systems, such as distance learning; in practice, therefore, both secondary and higher education have to be available "in different forms". As for the lack of reference in article 13(2)(c) to technical and vocational education, given article 6(2) of the Covenant and article 26(1) of the Universal Declaration, TVE forms an integral component of all levels of education, including higher education.[11]

19. The third and most significant difference between article 13(2)(b) and (c) is that while secondary education "shall be made generally available and accessible to all", higher education "shall be made equally accessible to all, on the basis of capacity". According to article 13(2)(c), higher education is not to be "generally available", but only available "on the basis of capacity". The "capacity" of individuals should be assessed by reference to all their relevant expertise and experience.

20. So far as the wording of article 13(2)(b) and (c) is the same (*e.g.* "the progressive introduction of free education"), see the previous comments on article 13(2)(b).

Article 13(2)(d): The right to fundamental education

21. Fundamental education includes the elements of availability, accessibility, acceptability and adaptability which are common to education in all its forms and at all levels.[12]

22. In general terms, fundamental education corresponds to basic education as set out in the World Declaration on Education For All.[13] By virtue of article 13(2)(d), individuals "who have not received or completed the whole period of their primary education" have a right to fundamental education, or basic education as defined in the World Declaration on Education For All.

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[11] See para. 15.
[12] See para. 6.
[13] See para. 9.

23. Since everyone has the right to the satisfaction of their "basic learning needs" as understood by the World Declaration, the right to fundamental education is not confined to those "who have not received or completed the whole period of their primary education". The right to fundamental education extends to all those who have not yet satisfied their "basic learning needs".

24. It should be emphasised that enjoyment of the right to fundamental education is not limited by age or gender; it extends to children, youth and adults, including older persons. Fundamental education, therefore, is an integral component of adult education and life-long learning. Because fundamental education is a right of all age groups, curricula and delivery systems must be devised which are suitable for students of all ages.

Article 13(2)(e): A school system; adequate fellowship system; material conditions of teaching staff

25. The requirement that the "development of a system of schools at all levels shall be actively pursued" means that a State party is obliged to have an overall developmental strategy for its school system. The strategy must encompass schooling at all levels, but the Covenant requires States parties to prioritise primary education (see para. 51). "[A]ctively pursued" suggests that the overall strategy should attract a degree of governmental priority and, in any event, must be implemented with vigour.

26. The requirement that "an adequate fellowship system shall be established" should be read with the Covenant's non-discrimination and equality provisions; the fellowship system should enhance equality of educational access for individuals from disadvantaged groups.

27. While the Covenant requires that "the material conditions of teaching staff shall be continuously improved", in practice the general working conditions of teachers have deteriorated, and reached unacceptably low levels, in many States parties in recent years. Not only is this inconsistent with article 13(2)(e), but it is also a major obstacle to the full realisation of students' right to education. The Committee also notes the relationship between articles 13(2)(e), 2(2), 3 and 6–8 of the Covenant, including the right of teachers to organise and bargain collectively; draws the attention of States parties to the joint UNESCO-ILO Recommendation Concerning the Status of Teachers (1966) and the UNESCO Recommendation Concerning the Status of Higher-Education Teaching Personnel (1997); and urges States parties to report on measures they are taking to ensure

that all teaching staff enjoy the conditions and status commensurate with their role.

Article 13(3) and (4): The right to educational freedom

28. Article 13(3) has two elements, one of which is that States parties undertake to respect the liberty of parents and guardians to ensure the religious and moral education of their children in conformity with their own convictions.[14] The Committee is of the view that this element of article 13(3) permits public school instruction in subjects such as the general history of religions and ethics if it is given in an unbiased and objective way, respectful of the freedoms of opinion, conscience and expression. It notes that public education that includes instruction in a particular religion or belief is inconsistent with article 13(3) unless provision is made for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents and guardians.

29. The second element of article 13(3) is the liberty of parents and guardians to choose other than public schools for their children, provided the schools conform to "such minimum educational standards as may be laid down or approved by the State". This has to be read with the complementary provision, article 13(4), which affirms "the liberty of individuals and bodies to establish and direct educational institutions", provided the institutions conform to the educational objectives set out in article 13(1) and certain minimum standards. These minimum standards may relate to issues such as admission, curricula and the recognition of certificates. In their turn, these standards must be consistent with the educational objectives set out in article 13(1).

30. Under article 13(4), everyone, including non-nationals, has the liberty to establish and direct educational institutions. The liberty also extends to "bodies", *i.e.* legal persons or entities. It includes the right to establish and direct all types of educational institutions, including nurseries, universities and institutions for adult education. Given the principles of non-discrimination, equal opportunity and effective participation in society for all, the State has an obligation to ensure that the liberty set out in article 13(4)

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[14] This replicates article 18(4) of the International Covenant on Civil and Political Rights (ICCPR) and also relates to the freedom to teach a religion or belief as stated in article 18(1) ICCPR. (See Human Rights Committee General Comment 22 on article 18 ICCPR, forty-eighth session, 1993.) The Human Rights Committee notes that the fundamental character of article 18 ICCPR is reflected in the fact that this provision cannot be derogated from, even in time of public emergency, as stated in article 4(2) of that Covenant.

does not lead to extreme disparities of educational opportunity for some groups in society.

Article 13: Special topics of broad application

Non-discrimination and equal treatment

31. The prohibition against discrimination enshrined in article 2(2) of the Covenant is subject to neither progressive realisation nor the availability of resources; it applies fully and immediately to all aspects of education and encompasses all internationally prohibited grounds of discrimination. The Committee interprets articles 2(2) and 3 in the light of the UNESCO Convention against Discrimination in Education, the relevant provisions of the Convention on the Elimination of All Forms of Discrimination against Women, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Rights of the Child and the ILO Indigenous and Tribal Peoples Convention, 1989 (Convention No. 169), and wishes to draw particular attention to the following issues.

32. The adoption of temporary special measures intended to bring about *de facto* equality for men and women and for disadvantaged groups is not a violation of the right to non-discrimination with regard to education, so long as such measures do not lead to the maintenance of unequal or separate standards for different groups, and provided they are not continued after the objectives for which they were taken have been achieved.

33. In some circumstances, separate educational systems or institutions for groups defined by the categories in article 2(2) shall be deemed not to constitute a breach of the Covenant. In this regard, the Committee affirms article 2 of the UNESCO Convention against Discrimination in Education (1960).[15]

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[15] According to article 2: "When permitted in a State, the following situations shall not be deemed to constitute discrimination, within the meaning of article 1 of this Convention: (a) The establishment or maintenance of separate educational systems or institutions for pupils of the two sexes, if these systems or institutions offer equivalent access to education, provide a teaching staff with qualifications of the same standard as well as school premises and equipment of the same quality, and afford the opportunity to take the same or equivalent courses of study; (b) The establishment or maintenance, for religious or linguistic reasons, of separate educational systems or institutions offering an education which is in keeping with the wishes of the pupil's parents or legal guardians, if participation in such systems or attendance at such institutions is optional and if the education provided conforms to such standards as may be laid down or approved by the competent authorities, in particular for education of the same level; (c) The establishment or maintenance of private edu-

34. The Committee takes note of article 2 of the Convention on the Rights of the Child and article 3(e) of the UNESCO Convention against Discrimination in Education and confirms that the principle of non-discrimination extends to all persons of school age residing in the territory of a State party, including non-nationals, and irrespective of their legal status.

35. Sharp disparities in spending policies that result in differing qualities of education for persons residing in different geographic locations may constitute discrimination under the Covenant.

36. The Committee affirms paragraph 35 of its General Comment 5, which addresses the issue of persons with disabilities in the context of the right to education, and paragraphs 36–42 of its General Comment 6, which address the issue of older persons in relation to articles 13–15 of the Covenant.

37. States parties must closely monitor education—including all relevant policies, institutions, programmes, spending patterns and other practices—so as to identify and take measures to redress any *de facto* discrimination. Educational data should be disaggregated by the prohibited grounds of discrimination.

Academic freedom and institutional autonomy[16]

38. In the light of its examination of numerous States parties' reports, the Committee has formed the view that the right to education can only be enjoyed if accompanied by the academic freedom of staff and students. Accordingly, even though the issue is not explicitly mentioned in article 13, it is appropriate and necessary for the Committee to make some observations about academic freedom. The following remarks give particular attention to institutions of higher education because, in the Committee's experience, staff and students in higher education are especially vulnerable to political and other pressures which undermine academic freedom. The Committee wishes to emphasise, however, that staff and students

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cational institutions, if the object of the institutions is not to secure the exclusion of any group but to provide educational facilities in addition to those provided by the public authorities, if the institutions are conducted in accordance with that object, and if the education provided conforms with such standards as may be laid down or approved by the competent authorities, in particular for education of the same level."

[16] See UNESCO Recommendation Concerning the Status of Higher-Education Teaching Personnel (1997).

throughout the education sector are entitled to academic freedom and many of the following observations have general application.

39. Members of the academic community, individually or collectively, are free to pursue, develop and transmit knowledge and ideas, through research, teaching, study, discussion, documentation, production, creation or writing. Academic freedom includes the liberty of individuals to express freely opinions about the institution or system in which they work, to fulfil their functions without discrimination or fear of repression by the State or any other actor, to participate in professional or representative academic bodies, and to enjoy all the internationally recognised human rights applicable to other individuals in the same jurisdiction. The enjoyment of academic freedom carries with it obligations, such as the duty to respect the academic freedom of others, to ensure the fair discussion of contrary views, and to treat all without discrimination on any of the prohibited grounds.

40. The enjoyment of academic freedom requires the autonomy of institutions of higher education. Autonomy is that degree of self-governance necessary for effective decision-making by institutions of higher education in relation to their academic work, standards, management and related activities. Self-governance, however, must be consistent with systems of public accountability, especially in respect of funding provided by the State. Given the substantial public investments made in higher education, an appropriate balance has to be struck between institutional autonomy and accountability. While there is no single model, institutional arrangements should be fair, just and equitable, and as transparent and participatory as possible.

Discipline in schools[17]

41. In the Committee's view, corporal punishment is inconsistent with the fundamental guiding principle of international human rights law enshrined in the Preambles to the Universal Declaration of Human Rights and both Covenants: the dignity of the individual.[18] Other aspects of school discipline may also be inconsistent with human dignity, such as public humil-

[17] In formulating this paragraph, the Committee has taken note of the practice evolving elsewhere in the international human rights system, such as the interpretation given by the Committee on the Rights of the Child to article 28(2) of the Convention on the Rights of the Child, as well as the Human Rights Committee's interpretation of article 7 of ICCPR.

[18] The Committee notes that, although it is absent from article 26(2) of the Declaration, the drafters of ICESCR expressly included the dignity of the human personality as one of the mandatory objectives to which all education is to be directed (art. 13(1)).

iation. Nor should any form of discipline breach other rights under the Covenant, such as the right to food. A State party is required to take measures to ensure that discipline which is inconsistent with the Covenant does not occur in any public or private educational institution within its jurisdiction. The Committee welcomes initiatives taken by some States parties which actively encourage schools to introduce "positive", non-violent approaches to school discipline.

Limitations on article 13

42. The Committee wishes to emphasise that the Covenant's limitations clause, article 4, is primarily intended to be protective of the rights of individuals rather than permissive of the imposition of limitations by the State. Consequently, a State party which closes a university or other educational institution on grounds such as national security or the preservation of public order has the burden of justifying such a serious measure in relation to each of the elements identified in article 4.

II. States parties' obligations and violations

General legal obligations

43. While the Covenant provides for progressive realisation and acknowledges the constraints due to the limits of available resources, it also imposes on States parties various obligations which are of immediate effect.[19] States parties have immediate obligations in relation to the right to education, such as the "guarantee" that the right "will be exercised without discrimination of any kind" (art. 2(2)) and the obligation "to take steps" (art. 2(1)) towards the full realisation of article 13.[20] Such steps must be "deliberate, concrete and targeted" towards the full realisation of the right to education.

44. The realisation of the right to education over time, that is "progressively", should not be interpreted as depriving States parties' obligations of all meaningful content. Progressive realisation means that States parties have a specific and continuing obligation "to move as expeditiously and effectively as possible" towards the full realisation of article 13.[21]

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[19] See the Committee's General Comment 3, para. 1.
[20] See the Committee's General Comment 3, para. 2.
[21] See the Committee's General Comment 3, para. 9.

45. There is a strong presumption of impermissibility of any retrogressive measures taken in relation to the right to education, as well as other rights enunciated in the Covenant. If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the State party's maximum available resources.[22]

46. The right to education, like all human rights, imposes three types or levels of obligations on States parties: the obligations to respect, protect and fulfil. In turn, the obligation to fulfil incorporates both an obligation to facilitate and an obligation to provide.

47. The obligation to respect requires States parties to avoid measures that hinder or prevent the enjoyment of the right to education. The obligation to protect requires States parties to take measures that prevent third parties from interfering with the enjoyment of the right to education. The obligation to fulfil (facilitate) requires States to take positive measures that enable and assist individuals and communities to enjoy the right to education. Finally, States parties have an obligation to fulfil (provide) the right to education. As a general rule, States parties are obliged to fulfil (provide) a specific right in the Covenant when an individual or group is unable, for reasons beyond their control, to realise the right themselves by the means at their disposal. However, the extent of this obligation is always subject to the text of the Covenant.

48. In this respect, two features of article 13 require emphasis. First, it is clear that article 13 regards States as having principal responsibility for the direct provision of education in most circumstances; States parties recognise, for example, that the "development of a system of schools at all levels shall be actively pursued" (art. 13(2)(e)). Secondly, given the differential wording of article 13(2) in relation to primary, secondary, higher and fundamental education, the parameters of a State party's obligation to fulfil (provide) are not the same for all levels of education. Accordingly, in light of the text of the Covenant, States parties have an enhanced obligation to fulfil (provide) regarding the right to education, but the extent of this obligation is not uniform for all levels of education. The Committee observes that this interpretation of the obligation to fulfil (provide) in rela-

[22] See the Committee's General Comment 3, para. 9.

tion to article 13 coincides with the law and practice of numerous States parties.

Specific legal obligations

49. States parties are required to ensure that curricula, for all levels of the educational system, are directed to the objectives identified in article 13(1).[23] They are also obliged to establish and maintain a transparent and effective system which monitors whether or not education is, in fact, directed to the educational objectives set out in article 13(1).

50. In relation to article 13(2), States have obligations to respect, protect and fulfil each of the "essential features" (availability, accessibility, acceptability, adaptability) of the right to education. By way of illustration, a State must respect the availability of education by not closing private schools; protect the accessibility of education by ensuring that third parties, including parents and employers, do not stop girls from going to school; fulfil (facilitate) the acceptability of education by taking positive measures to ensure that education is culturally appropriate for minorities and indigenous peoples, and of good quality for all; fulfil (provide) the adaptability of education by designing and providing resources for curricula which reflect the contemporary needs of students in a changing world; and fulfil (provide) the availability of education by actively developing a system of schools, including building classrooms, delivering programmes, providing teaching materials, training teachers and paying them domestically competitive salaries.

51. As already observed, the obligations of States parties in relation to primary, secondary, higher and fundamental education are not identical. Given the wording of article 13(2), States parties are obliged to prioritise the introduction of compulsory, free primary education.[24] This interpretation

[23] There are numerous resources to assist States parties in this regard, such as UNESCO's Guidelines for Curriculum and Textbook Development in International Education (ED/ECS/HCI). One of the objectives of article 13(1) is to "strengthen the respect of human rights and fundamental freedoms"; in this particular context, States parties should examine the initiatives developed within the framework of the United Nations Decade for Human Rights Education—especially instructive is the Plan of Action for the Decade, adopted by the General Assembly in 1996, and the Guidelines for National Plans of Action for Human Rights Education, developed by the Office of the High Commissioner for Human Rights to assist States in responding to the United Nations Decade for Human Rights Education.

[24] On the meaning of "compulsory" and "free", see paragraphs 6 and 7 of General Comment 11 on article 14.

of article 13(2) is reinforced by the priority accorded to primary education in article 14. The obligation to provide primary education for all is an immediate duty of all States parties.

52. In relation to article 13(2)(b)–(d), a State party has an immediate obligation "to take steps" (art. 2(1)) towards the realisation of secondary, higher and fundamental education for all those within its jurisdiction. At a minimum, the State party is required to adopt and implement a national educational strategy which includes the provision of secondary, higher and fundamental education in accordance with the Covenant. This strategy should include mechanisms, such as indicators and benchmarks on the right to education, by which progress can be closely monitored.

53. Under article 13(2)(e), States parties are obliged to ensure that an educational fellowship system is in place to assist disadvantaged groups.[25] The obligation to pursue actively the "development of a system of schools at all levels" reinforces the principal responsibility of States parties to ensure the direct provision of the right to education in most circumstances.[26]

54. States parties are obliged to establish "minimum educational standards" to which all educational institutions established in accordance with article 13(3) and (4) are required to conform. They must also maintain a transparent and effective system to monitor such standards. A State party has no obligation to fund institutions established in accordance with article 13(3) and (4); however, if a State elects to make a financial contribution to private educational institutions, it must do so without discrimination on any of the prohibited grounds.

55. States parties have an obligation to ensure that communities and families are not dependent on child labour. The Committee especially affirms the importance of education in eliminating child labour and the obligations set out in article 7(2) of the Worst Forms of Child Labour Convention, 1999 (Convention No. 182).[27] Additionally, given article 2(2),

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[25] In appropriate cases, such a fellowship system would be an especially appropriate target for the international assistance and co-operation anticipated by article 2(1).

[26] In the context of basic education, UNICEF has observed: "Only the State . . . can pull together all the components into a coherent but flexible education system". UNICEF, *The State of the World's Children, 1999*, "The education revolution", p. 77.

[27] According to article 7(2), "(e)ach Member shall, taking into account the importance of education in eliminating child labour, take effective and time-bound measures to: (c) ensure access to free basic education, and, wherever possible and appropriate, vocational training, for all children removed from the worst forms of child labour" (ILO Convention No. 182, Worst Forms of Child Labour, 1999).

States parties are obliged to remove gender and other stereotyping which impedes the educational access of girls, women and other disadvantaged groups.

56. In its General Comment 3, the Committee drew attention to the obligation of all States parties to take steps, "individually and through international assistance and co-operation, especially economic and technical", towards the full realisation of the rights recognised in the Covenant, such as the right to education.[28] Articles 2(1) and 23 of the Covenant, Article 56 of the Charter of the United Nations, article 10 of the World Declaration on Education for All, and Part I, paragraph 34 of the Vienna Declaration and Programme of Action all reinforce the obligation of States parties in relation to the provision of international assistance and co-operation for the full realisation of the right to education. In relation to the negotiation and ratification of international agreements, States parties should take steps to ensure that these instruments do not adversely impact upon the right to education. Similarly, States parties have an obligation to ensure that their actions as members of international organisations, including international financial institutions, take due account of the right to education.

57. In its General Comment 3, the Committee confirmed that States parties have "a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels" of each of the rights enunciated in the Covenant, including "the most basic forms of education". In the context of article 13, this core includes an obligation: to ensure the right of access to public educational institutions and programmes on a non-discriminatory basis; to ensure that education conforms to the objectives set out in article 13(1); to provide primary education for all in accordance with article 13(2)(a); to adopt and implement a national educational strategy which includes provision for secondary, higher and fundamental education; and to ensure free choice of education without interference from the State or third parties, subject to conformity with "minimum educational standards" (art. 13(3) and (4)).

Violations

58. When the normative content of article 13 (Part I) is applied to the general and specific obligations of States parties (Part II), a dynamic process is set in motion which facilitates identification of violations of the right to

[28] See the Committee's General Comment 3, paras. 13–14.

education. Violations of article 13 may occur through the direct action of States parties (acts of commission) or through their failure to take steps required by the Covenant (acts of omission).

59. By way of illustration, violations of article 13 include: the introduction or failure to repeal legislation which discriminates against individuals or groups, on any of the prohibited grounds, in the field of education; the failure to take measures which address *de facto* educational discrimination; the use of curricula inconsistent with the educational objectives set out in article 13(1); the failure to maintain a transparent and effective system to monitor conformity with article 13(1); the failure to introduce, as a matter of priority, primary education which is compulsory and available free to all; the failure to take "deliberate, concrete and targeted" measures towards the progressive realisation of secondary, higher and fundamental education in accordance with article 13(2)(b)–(d); the prohibition of private educational institutions; the failure to ensure private educational institutions conform to the "minimum educational standards" required by article 13(3) and (4); the denial of academic freedom of staff and students; the closure of educational institutions in times of political tension in non-conformity with article 4.

III. Obligations of actors other than states parties

60. Given article 22 of the Covenant, the role of the United Nations agencies, including at the country level through the United Nations Development Assistance Framework (UNDAF), is of special importance in relation to the realisation of article 13. Co-ordinated efforts for the realisation of the right to education should be maintained to improve coherence and interaction among all the actors concerned, including the various components of civil society. UNESCO, the United Nations Development Programme, UNICEF, ILO, the World Bank, the regional development banks, the International Monetary Fund and other relevant bodies within the United Nations system should enhance their co-operation for the implementation of the right to education at the national level, with due respect to their specific mandates, and building on their respective expertise. In particular, the international financial institutions, notably the World Bank and IMF, should pay greater attention to the protection of the right to education in their lending policies, credit agreements, structural adjustment programmes and measures taken in response to the debt crisis.[29] When

[29] See the Committee's General Comment 2, para. 9.

examining the reports of States parties, the Committee will consider the effects of the assistance provided by all actors other than States parties on the ability of States to meet their obligations under article 13. The adoption of a human rights-based approach by United Nations specialised agencies, programmes and bodies will greatly facilitate implementation of the right to education.

3. *General Comment No. 1 of the Committee on the Rights of the Child: The aims of education (art. 29(1) CRC)*

(Twenty-Sixth Session, 2001) [UN Doc. CRC/C/103]

The significance of article 29(1)

1. Article 29, paragraph 1, of the Convention on the Rights of the Child is of far-reaching importance. The aims of education that it sets out, which have been agreed to by all States parties, promote, support and protect the core value of the Convention: the human dignity innate in every child and his or her equal and inalienable rights. These aims, set out in the five subparagraphs of article 29(1), are all linked directly to the realisation of the child's human dignity and rights, taking into account the child's special developmental needs and diverse evolving capacities. The aims are: the holistic development of the full potential of the child (29(1)(a)), including development of respect for human rights (29(1)(b)), an enhanced sense of identity and affiliation (29(1)(c)), and his or her socialisation and interaction with others (29(1)(d)) and with the environment (29(1)(e)).

2. Article 29(1) not only adds to the right to education recognised in article 28 a qualitative dimension which reflects the rights and inherent dignity of the child; it also insists upon the need for education to be child-centred, child-friendly and empowering, and it highlights the need for educational processes to be based upon the very principles it enunciates.[1] The education to which every child has a right is one designed to provide the child with life skills, to strengthen the child's capacity to enjoy

[1] In this regard, the Committee takes note of General Comment No. 13 (1999) of the Committee on Economic, Social and Cultural Rights on the right to education, which deals, *inter alia*, with the aims of education under article 13(1) of the International Covenant on Economic, Social and Cultural Rights. The Committee also draws attention to the general guidelines regarding the form and contents of periodic reports to be submitted by States parties under article 44, paragraph 1(b), of the Convention (CRC/C/58, paras. 112–116).

the full range of human rights and to promote a culture which is infused by appropriate human rights values. The goal is to empower the child by developing his or her skills, learning and other capacities, human dignity, self-esteem and self-confidence. "Education" in this context goes far beyond formal schooling to embrace the broad range of life experiences and learning processes which enable children, individually and collectively, to develop their personalities, talents and abilities and to live a full and satisfying life within society.

3. The child's right to education is not only a matter of access (art. 28) but also of content. An education with its contents firmly rooted in the values of article 29(1) is for every child an indispensable tool for her or his efforts to achieve in the course of her or his life a balanced, human rights-friendly response to the challenges that accompany a period of fundamental change driven by globalisation, new technologies and related phenomena. Such challenges include the tensions between, *inter alia*, the global and the local; the individual and the collective; tradition and modernity; long- and short-term considerations; competition and equality of opportunity; the expansion of knowledge and the capacity to assimilate it; and the spiritual and the material.[2] And yet, in the national and international programmes and policies on education that really count, the elements embodied in article 29(1) seem all too often to be either largely missing or present only as a cosmetic afterthought.

4. Article 29(1) states that the States parties agree that education should be directed to a wide range of values. This agreement overcomes the boundaries of religion, nation and culture built across many parts of the world. At first sight, some of the diverse values expressed in article 29(1) might be thought to be in conflict with one another in certain situations. Thus, efforts to promote understanding, tolerance and friendship among all peoples, to which paragraph (1)(d) refers, might not always be automatically compatible with policies designed, in accordance with paragraph (1)(c), to develop respect for the child's own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilisations different from his or her own. But in fact, part of the importance of this provision lies precisely in its recognition of the need for a balanced approach to education and one which succeeds in reconciling diverse values through

[2] United Nations Educational, Scientific and Cultural Organisation, *Learning: The Treasure Within*, Report of the International Commission on Education for the 21st Century, 1996 pp. 16–18.

dialogue and respect for difference. Moreover, children are capable of playing a unique role in bridging many of the differences that have historically separated groups of people from one another.

The functions of article 29(1)

5. Article 29(1) is much more than an inventory or listing of different objectives which education should seek to achieve. Within the overall context of the Convention it serves to highlight, *inter alia*, the following dimensions.

6. First, it emphasises the indispensable interconnected nature of the Convention's provisions. It draws upon, reinforces, integrates and complements a variety of other provisions and cannot be properly understood in isolation from them. In addition to the general principles of the Convention—non-discrimination (art. 2), the best interest of the child (art. 3), the right to life, survival and development (art. 6) and the right to express views and have them taken into account (art. 12)—many other provisions may be mentioned, such as but not limited to the rights and responsibilities of parents (arts. 5 and 18), freedom of expression (art. 13), freedom of thought (art. 14), the right to information (art. 17), the rights of children with disabilities (art. 23), the right to education for health (art. 24), the right to education (art. 28), and the linguistic and cultural rights of children belonging to minority groups (art. 30).

7. Children's rights are not detached or isolated values devoid of context, but exist within a broader ethical framework which is partly described in article 29(1) and in the preamble to the Convention. Many of the criticisms that have been made of the Convention are specifically answered by this provision. Thus, for example, this article underlines the importance of respect for parents, of the need to view rights within their broader ethical, moral, spiritual, cultural or social framework and of the fact that most children's rights, far from being externally imposed, are embedded within the values of local communities.

8. Second, the article attaches importance to the process by which the right to education is to be promoted. Thus, efforts to promote the enjoyment of other rights must not be undermined, and should be reinforced, by the values imparted in the educational process. This includes not only the content of the curriculum but also the educational processes, the pedagogical methods and the environment within which education takes place, whether it be the home, school, or elsewhere. Children do not lose their human rights by virtue of passing through the school gates. Thus, for

example, education must be provided in a way that respects the inherent dignity of the child and enables the child to express his or her views freely in accordance with article 12(1) and to participate in school life. Education must also be provided in a way that respects the strict limits on discipline reflected in article 28(2) and promotes non-violence in school. The Committee has repeatedly made clear in its concluding observations that the use of corporal punishment does not respect the inherent dignity of the child nor the strict limits on school discipline. Compliance with the values recognised in article 29(1) clearly requires that schools be child-friendly in the fullest sense of the term and that they be consistent in all respects with the dignity of the child. The participation of children in school life, the creation of school communities and student councils, peer education and peer counselling, and the involvement of children in school disciplinary proceedings should be promoted as part of the process of learning and experiencing the realisation of rights.

9. Third, while article 28 focuses upon the obligations of States parties in relation to the establishment of educational systems and in ensuring access thereto, article 29(1) underlies the individual and subjective right to a specific quality of education. Consistent with the Convention's emphasis on the importance of acting in the best interests of the child, this article emphasises the message of child-centred education: that the key goal of education is the development of the individual child's personality, talents and abilities, in recognition of the fact that every child has unique characteristics, interests, abilities, and learning needs.[3] Thus, the curriculum must be of direct relevance to the child's social, cultural, environmental and economic context and to his or her present and future needs and take full account of the child's evolving capacities; teaching methods should be tailored to the different needs of different children. Education must also be aimed at ensuring that essential life skills are learnt by every child and that no child leaves school without being equipped to face the challenges that he or she can expect to be confronted with in life. Basic skills include not only literacy and numeracy but also life skills such as the ability to make well-balanced decisions; to resolve conflicts in a non-violent manner; and to develop a healthy lifestyle, good social relationships and responsibility, critical thinking, creative talents, and other abilities which give children the tools needed to pursue their options in life.

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[3] United Nations Educational, Scientific and Cultural Organisation, *The Salamanca Statement and Framework for Action on Special Needs Education*, 1994, p. viii.

10. Discrimination on the basis of any of the grounds listed in article 2 of the Convention, whether it is overt or hidden, offends the human dignity of the child and is capable of undermining or even destroying the capacity of the child to benefit from educational opportunities. While denying a child's access to educational opportunities is primarily a matter which relates to article 28 of the Convention, there are many ways in which failure to comply with the principles contained in article 29(1) can have a similar effect. To take an extreme example, gender discrimination can be reinforced by practices such as a curriculum which is inconsistent with the principles of gender equality, by arrangements which limit the benefits girls can obtain from the educational opportunities offered, and by unsafe or unfriendly environments which discourage girls' participation. Discrimination against children with disabilities is also pervasive in many formal educational systems and in a great many informal educational settings, including in the home.[4] Children with HIV/AIDS are also heavily discriminated against in both settings.[5] All such discriminatory practices are in direct contradiction with the requirements in article 29(1)(a) that education be directed to the development of the child's personality, talents and mental and physical abilities to their fullest potential.

11. The Committee also wishes to highlight the links between article 29(1) and the struggle against racism, racial discrimination, xenophobia and related intolerance. Racism and related phenomena thrive where there is ignorance, unfounded fears of racial, ethnic, religious, cultural and linguistic or other forms of difference, the exploitation of prejudices, or the teaching or dissemination of distorted values. A reliable and enduring antidote to all of these failings is the provision of education which promotes an understanding and appreciation of the values reflected in article 29(1), including respect for differences, and challenges all aspects of discrimination and prejudice. Education should thus be accorded one of the highest priorities in all campaigns against the evils of racism and related phenomena. Emphasis must also be placed upon the importance of teaching about racism as it has been practised historically, and particularly as it manifests or has manifested itself within particular communities. Racist behaviour is not something engaged in only by "others". It is therefore important to focus on the child's own community when teaching human

[4] See General Comment No. 5 (1994) of the Committee on Economic, Social and Cultural Rights on persons with disabilities.

[5] See the recommendations adopted by the Committee on the Rights of the Child after its day of general discussion in 1998 on children living in a world with HIV/AIDS (A/55/41, para. 1536).

and children's rights and the principle of non-discrimination. Such teaching can effectively contribute to the prevention and elimination of racism, ethnic discrimination, xenophobia and related intolerance.

12. Fourth, article 29(1) insists upon a holistic approach to education which ensures that the educational opportunities made available reflect an appropriate balance between promoting the physical, mental, spiritual and emotional aspects of education, the intellectual, social and practical dimensions, and the childhood and lifelong aspects. The overall objective of education is to maximise the child's ability and opportunity to participate fully and responsibly in a free society. It should be emphasised that the type of teaching that is focused primarily on accumulation of knowledge, prompting competition and leading to an excessive burden of work on children, may seriously hamper the harmonious development of the child to the fullest potential of his or her abilities and talents. Education should be child-friendly, inspiring and motivating the individual child. Schools should foster a humane atmosphere and allow children to develop according to their evolving capacities.

13. Fifth, it emphasises the need for education to be designed and provided in such a way that it promotes and reinforces the range of specific ethical values enshrined in the Convention, including education for peace, tolerance, and respect for the natural environment, in an integrated and holistic manner. This may require a multidisciplinary approach. The promotion and reinforcement of the values of article 29(1) are not only necessary because of problems elsewhere, but must also focus on problems within the child's own community. Education in this regard should take place within the family, but schools and communities must also play an important role. For example, for the development of respect for the natural environment, education must link issues of environmental and sustainable development with socio-economic, socio-cultural and demographic issues. Similarly, respect for the natural environment should be learnt by children at home, in school and within the community, encompass both national and international problems, and actively involve children in local, regional or global environmental projects.

14. Sixth, it reflects the vital role of appropriate educational opportunities in the promotion of all other human rights and the understanding of their indivisibility. A child's capacity to participate fully and responsibly in a free society can be impaired or undermined not only by outright denial of access to education but also by a failure to promote an understanding of the values recognised in this article.

Human rights education

15. Article 29(1) can also be seen as a foundation stone for the various programmes of human rights education called for by the World Conference on Human Rights, held in Vienna in 1993, and promoted by international agencies. Nevertheless, the rights of the child have not always been given the prominence they require in the context of such activities. Human rights education should provide information on the content of human rights treaties. But children should also learn about human rights by seeing human rights standards implemented in practice, whether at home, in school, or within the community. Human rights education should be a comprehensive, lifelong process and start with the reflection of human rights values in the daily life and experiences of children.[6]

16. The values embodied in article 29(1) are relevant to children living in zones of peace but they are even more important for those living in situations of conflict or emergency. As the Dakar Framework for Action notes, it is important in the context of education systems affected by conflict, natural calamities and instability that educational programmes be conducted in ways that promote mutual understanding, peace and tolerance, and that help to prevent violence and conflict.[7] Education about international humanitarian law also constitutes an important, but all too often neglected, dimension of efforts to give effect to article 29(1).

Implementation, monitoring and review

17. The aims and values reflected in this article are stated in quite general terms and their implications are potentially very wide-ranging. This seems to have led many States parties to assume that it is unnecessary, or even inappropriate, to ensure that the relevant principles are reflected in legislation or in administrative directives. This assumption is unwarranted. In the absence of any specific formal endorsement in national law or policy, it seems unlikely that the relevant principles are or will be used to genuinely inform educational policies. The Committee therefore calls upon all States parties to take the necessary steps to formally incorporate these principles into their education policies and legislation at all levels.

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[6] See General Assembly resolution 49/184 of 23 December 1994 proclaiming the United Nations Decade for Human Rights Education.

[7] Education for All: Meeting our Collective Commitments, adopted at the World Education Forum, Dakar, 26–28 April 2000.

18. The effective promotion of article 29(1) requires the fundamental reworking of curricula to include the various aims of education and the systematic revision of textbooks and other teaching materials and technologies, as well as school policies. Approaches which do no more than seek to superimpose the aims and values of the article on the existing system without encouraging any deeper changes are clearly inadequate. The relevant values cannot be effectively integrated into, and thus be rendered consistent with, a broader curriculum unless those who are expected to transmit, promote, teach and, as far as possible, exemplify the values have themselves been convinced of their importance. Pre-service and in-service training schemes which promote the principles reflected in article 29(1) are thus essential for teachers, educational administrators and others involved in child education. It is also important that the teaching methods used in schools reflect the spirit and educational philosophy of the Convention on the Rights of the Child and the aims of education laid down in article 29(1).

19. In addition, the school environment itself must thus reflect the freedom and the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin called for in article 29(1)(b) and (d). A school which allows bullying or other violent and exclusionary practices to occur is not one which meets the requirements of article 29(1). The term "human rights education" is too often used in a way which greatly oversimplifies its connotations. What is needed, in addition to formal human rights education, is the promotion of values and policies conducive to human rights not only within schools and universities but also within the broader community.

20. In general terms, the various initiatives that States parties are required to take pursuant to their Convention obligations will be insufficiently grounded in the absence of widespread dissemination of the text of the Convention itself, in accordance with the provisions of article 42. This will also facilitate the role of children as promoters and defenders of children's rights in their daily lives. In order to facilitate broader dissemination, States parties should report on the measures they have taken to achieve this objective and the Office of the High Commissioner for Human Rights should develop a comprehensive database of the language versions of the Convention that have been produced.

21. The media, broadly defined, also have a central role to play, both in promoting the values and aims reflected in article 29(1) and in ensur-

ing that their activities do not undermine the efforts of others to promote those objectives. Governments are obligated by the Convention, pursuant to article 17(a), to take all appropriate steps to "encourage the mass media to disseminate information and material of social and cultural benefit to the child".[8]

22. The Committee calls upon States parties to devote more attention to education as a dynamic process and to devising means by which to measure changes over time in relation to article 29(1). Every child has the right to receive an education of good quality which in turn requires a focus on the quality of the learning environment, of teaching and learning processes and materials, and of learning outputs. The Committee notes the importance of surveys that may provide an opportunity to assess the progress made, based upon consideration of the views of all actors involved in the process, including children currently in or out of school, teachers and youth leaders, parents, and educational administrators and supervisors. In this respect, the Committee emphasises the role of national-level monitoring which seeks to ensure that children, parents and teachers can have an input in decisions relevant to education.

23. The Committee calls upon States parties to develop a comprehensive national plan of action to promote and monitor realisation of the objectives listed in article 29(1). If such a plan is drawn up in the larger context of a national action plan for children, a national human rights action plan, or a national human rights education strategy, the Government must ensure that it nonetheless addresses all of the issues dealt with in article 29(1) and does so from a child-rights perspective. The Committee urges that the United Nations and other international bodies concerned with educational policy and human rights education seek better co-ordination so as to enhance the effectiveness of the implementation of article 29(1).

24. The design and implementation of programmes to promote the values reflected in this article should become part of the standard response by Governments to almost all situations in which patterns of human rights violations have occurred. Thus, for example, where major incidents of racism, racial discrimination, xenophobia and related intolerance occur which involve those under 18, it can reasonably be presumed that the

[8] The Committee recalls the recommendations in this respect which emerged from its day of general discussion in 1996 on the child and the media (see A/53/41, para. 1396).

Government has not done all that is should to promote the values reflected in the Convention generally, and in article 29(1) in particular. Appropriate additional measures under article 29(1) should therefore be adopted which include research on and adoption of whatever educational techniques might have a positive impact in achieving the rights recognised in the Convention.

25. States parties should also consider establishing a review procedure which responds to complaints that existing policies or practices are not consistent with article 29(1). Such review procedures need not necessarily entail the creation of new legal, administrative, or educational bodies. They might also be entrusted to national human rights institutions or to existing administrative bodies. The Committee requests each State party when reporting on this article to identify the genuine possibilities that exist at the national or local level to obtain a review of existing approaches which are claimed to be incompatible with the Convention. Information should be provided as to how such reviews can be initiated and how many such review procedures have been undertaken within the reporting period.

26. In order to better focus the process of examining States parties' reports dealing with article 29(1), and in accordance with the requirement in article 44 that reports shall indicate factors and difficulties, the Committee requests each State party to provide a detailed indication in its periodic reports of what it considers to be the most important priorities within its jurisdiction which call for a more concerted effort to promote the values reflected in this provision and to outline the programme of activities which it proposes to take over the succeeding five years in order to address the problems identified.

27. The Committee calls upon United Nations bodies and agencies and other competent bodies whose role is underscored in article 45 of the Convention to contribute more actively and systematically to the Committee's work in relation to article 29(1).

28. Implementation of comprehensive national plans of action to enhance compliance with article 29(1) will require human and financial resources which should be available to the maximum extent possible, in accordance with article 4. Therefore, the Committee considers that resource constraints cannot provide a justification for a State party's failure to take any, or enough, of the measures that are required. In this context, and in light of the obligations upon States parties to promote and encourage international

co-operation both in general terms (articles 4 and 45 of the Convention) and in relation to education (art. 28(3)), the Committee urges States parties providing development co-operation to ensure that their programmes are designed so as to take full account of the principles contained in article 29(1).

OUTLINE OF STRUCTURE

PART A

A GENERAL ANALYSIS OF THE PROTECTION OF THE RIGHT TO EDUCATION BY INTERNATIONAL LAW

PART B

A SYSTEMATIC ANALYSIS OF THE RIGHT TO EDUCATION AS PROTECTED IN ARTICLE 13 OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

INDEX

ZUSAMMENFASSUNG (GERMAN SUMMARY)

DER VÖLKERRECHTLICHE SCHUTZ DES RECHTS AUF BILDUNG: EINSCHLIEßLICH EINER SYSTEMATISCHEN ANALYSE VON ARTIKEL 13 DES INTERNATIONALEN PAKTES ÜBER WIRTSCHAFTLICHE, SOZIALE UND KULTURELLE RECHTE

Thema

Das vorliegende Buch befasst sich mit dem völkerrechtlichen Schutz des Rechts auf Bildung, und nimmt des Weiteren eine systematische Analyse von Artikel 13 des Internationalen Paktes über wirtschaftliche, soziale und kulturelle Rechte vor.

Es wird allgemein anerkannt, dass "Bildung" ein wertvolles Gut ist. Deshalb wird ihr in vielen nationalen Verfassungen der Rang eines Menschenrechts verliehen. Aber auch auf internationaler Ebene wird "Bildung" zunehmend als Menschenrecht verstanden. Internationale Organisationen, wie etwa die Vereinten Nationen (VN) oder die *United Nations Educational, Scientific and Cultural Organisation* (UNESCO), und regionale Organisationen, wie der Europarat, haben diverse völkerrechtliche Verträge ausgearbeitet, die (u.a.) das Recht auf Bildung schützen. Einige dieser Verträge widmen sich insbesondere dem Schutz wirtschaftlicher, sozialer und kultureller Rechte, der Gruppe Menschenrechte, der man gemeinhin auch das Recht auf Bildung zuordnet. Der wichtigste solche Vertrag ist der Internationale Pakt über wirtschaftliche, soziale und kulturelle Rechte (1966), der das Recht auf Bildung in Artikel 13 gewährleistet. Artikel 13 stellt wohl die bedeutendste Formulierung des Rechts auf Bildung in einem völkerrechtlichen Vertrag dar. Obwohl das Völkerrecht "Bildung" seit geraumer Zeit als Menschenrecht definiert—in der Tat, seit die Allgemeine Erklärung der Menschenrechte von 1948 das Recht auf Bildung in Artikel 26 garantiert—lässt der Zustand vieler nationaler Bildungssysteme auch zu Beginn des 21. Jahrhunderts noch einiges zu wünschen übrig. Indem Staaten nun aber völkerrechtliche Verträge, die das Recht auf Bildung schützen, ratifizieren, übernehmen sie die völkerrechtliche Verpflichtung, das Recht auf Bildung zu verwirklichen und die Freiheit im Bildungswesen zu achten. Dies ist von großer Bedeutung, da die Beseitigung von Missständen im Bildungssystem und die Garantie des Zugangs zu Bildung somit zu *rechtlichen*

Fragen werden. Ein Staat, der es versäumt, das in einem völkerrechtlichen Vertrag verankerte Menschenrecht auf Bildung zu gewährleisten, verletzt internationales Recht, und ist dafür völkerrechtlich verantwortlich.

Ziele

Obwohl das Recht auf Bildung in verschiedenen Menschenrechtsverträgen gewährleistet wird, gibt es seit einiger Zeit die Entwicklung, "Bildung" nicht mehr als "Menschenrecht", sondern als "menschliches Bedürfnis" zu definieren. Diese Entwicklung geht auf die Weltkonferenz über Schulbildung für alle zurück, die 1990 in Jomtien, Thailand stattfand und die "Schulbildung für alle"-Bewegung begründete. Artikel 1 Absatz 1 der von der Konferenz angenommenen Welterklärung über Schulbildung für alle spricht davon, dass Bildungsangebote den "Lernbedürfnissen" des einzelnen gerecht werden müssen. Das Resultat dieser Entwicklung, die "Bildung" vom "Recht" zum "Bedürfnis" degradiert, ist, dass "Bildung" zu einer Ware wird, die zu einem Preis angeboten werden kann. Wer sie sich nicht leisten kann, dem bleibt der Zugang zu guter Bildung verwehrt. Definiert man "Bildung" aber als "Menschenrecht", so hat dies gänzlich andere Konsequenzen: In diesem Fall ist der Staat rechtlich dazu verpflichtet, den Zugang zu kostenloser/kostengünstiger guter Bildung für alle zu garantieren. Wie bereits angedeutet, kommt ein Staat dieser Verpflichtung nicht nach, macht er sich einer Menschenrechtsverletzung schuldig, für die er rechtlich haftet. Angesichts der neueren Entwicklung, sich mit Bezug auf Bildungsthemen nicht mehr auf Menschenrechtsstandards zu berufen, ist es *ein Ziel* des vorliegenden Buches, dazu beizutragen, dass das "Recht auf Bildung" "vor dem Verschwinden bewahrt wird". Zu diesem Zweck werden die zahlreichen internationalen Instrumente, die "Bildung" als "Menschenrecht" schützen, genannt und analysiert.

Aber selbst Staaten, die "Bildung" als "Menschenrecht" anerkennen und gewillt sind, völkerrechtliche Verträge, die das Recht auf Bildung schützen, einzuhalten, sind dennoch oft nicht in der Lage, die Verhältnisse im Bildungswesen, aus menschenrechtlicher Perspektive betrachtet, zu verbessern. Der Grund dafür ist, dass viele Staaten nicht ausreichend über die Verpflichtungen, die aus dem Recht auf Bildung hervorgehen, Bescheid wissen. Dieses liegt an der komplexen Natur dieses Rechts. Wie allen wirtschaftlichen, sozialen und kulturellen Rechten, entspringen dem Recht auf Bildung positive Pflichten. Wirtschaftliche, soziale und kulturelle Rechte sind Rechte, die dem einzelnen einen angemessenen Lebensstandard ermöglichen sollen. Sie verpflichten Staaten, unter Ausschöpfung aller ihrer Möglichkeiten Maßnahmen zu treffen, um nach und nach die Verwirklichung

dieser Rechte zu erreichen. Dagegen weisen Rechte, die der vielen Staaten vertrauteren Gruppe bürgerlicher und politischer Rechte angehören, eine andere Struktur auf. Sie verpflichten Staaten, die Freiheit des einzelnen durch negatives Unterlassen zu achten. Da dem Recht auf Bildung positive Pflichten entspringen, die dem Staat einen großen Gestaltungsspielraum lassen, sind sich viele Staaten nicht darüber im Klaren, was genau sie tun müssen, um dieses Recht zu gewährleisten. Hinzu kommt, dass das Recht auf Bildung Eigenschaften aufweist, die es als bürgerliches und politisches Recht kennzeichnen. Anders formuliert, das Recht auf Bildung besitzt zwei Komponenten: eine soziale und eine freiheitliche Komponente. Erstere fordert Staaten auf, aktiv Maßnahmen zu treffen, um das Recht auf Bildung zu verwirklichen. Letztere hingegen fordert Staaten auf, die Freiheit, Schule und Bildung zu wählen und Bildungseinrichtungen zu schaffen und zu leiten, zu achten. Es ist somit klar ersichtlich, dass eine Anstrengung nötig ist, die diversen Pflichten, die aus dem Recht auf Bildung—wie in völkerrechtlichen Verträgen statuiert—hervorgehen, zu identifizieren und zu beschreiben. Es ist *ein weiteres Ziel* des vorliegenden Buches, diese Anstrengung zu machen, um so die Pflichten aufzuzeigen, die Staaten erfüllen müssen, wenn sie völkerrechtliche Verträge einhalten wollen.

Um die beiden genannten Ziele zu erreichen, soll in diesem Buch folgendes dargelegt werden:

Erstens soll dargestellt werden, dass "Bildung" allgemein als "Menschenrecht" anerkannt wird. So wird zum Beispiel gesagt, dass es ein Erfordernis der Menschenwürde sei, "Bildung" als "Menschenrecht" anzuerkennen. Auch die historische Entwicklung der Menschenrechte in der Alten Welt zeigt, dass "Bildung" zunehmend als "Menschenrecht" verstanden wurde. Weiter ist es so, dass die verschiedensten Kulturen und Gesellschaften der Welt den Anspruch des einzelnen auf Bildung, auf die eine oder andere Weise, bejahen. Aber auch auf der Ebene des Völkerrechts hat man "Bildung" als "Menschenrecht" anerkannt. Eine Reihe internationaler Erklärungen und Verträge garantiert das Recht auf Bildung.

Zweitens soll das Wesen des Rechts auf Bildung untersucht werden. Dieses soll im weiteren Kontext einer Betrachtung wirtschaftlicher, sozialer und kultureller Rechte geschehen. Wirtschaftliche, soziale und kulturelle Rechte werden oft kritisiert. Es wird versucht, der Kritik an diesen Rechten entgegenzutreten und Argumente zu Gunsten wirtschaftlicher, sozialer und kultureller Rechte zu nennen. Fragen bezüglich der Struktur wirtschaftlicher, sozialer und kultureller Rechte, ihrer Beziehung zu bürgerlichen und politischen Rechten, ihrer Justiziabilität, und der aus ihnen erwachsenden Verpflichtungen sollen beantwortet werden.

Drittens soll der Inhalt des Rechts auf Bildung nach geltendem Völkerrecht bestimmt werden. Bestimmungen zum Recht auf Bildung befinden sich in

vielen völkerrechtlichen Instrumenten. Man findet sie in VN-Instrumenten (z.B. Artikel 13 und 14 des Internationalen Paktes über wirtschaftliche, soziale und kulturelle Rechte (1966) oder Artikel 28 und 29 des Übereinkommens über die Rechte des Kindes (1989)), UNESCO-Instrumenten (z.B. in der Konvention über den Kampf gegen die Diskriminierung im Unterricht (1960)), Instrumenten des Europarates (z.B. Artikel 2 des Ersten Zusatzprotokolls zur Europäischen Konvention zum Schutze der Menschenrechte und Grundfreiheiten (1952)), und in vielen anderen Verträgen, Erklärungen und Empfehlungen, die in verschiedenen Kontexten angenommen wurden. Diese Instrumente werden eingeteilt, je nachdem, ob sie auf internationaler oder regionaler Ebene angenommen wurden. Instrumente, die von den VN-Sonderorganisationen (in diesem Fall der *United Nations Educational, Scientific and Cultural Organisation* (UNESCO) und der *International Labour Organisation* (ILO)) angenommen wurden, werden gesondert behandelt. Die Bestimmungen der verschiedenen Instrumente zum Recht auf Bildung werden zitiert und dann im Lichte relevanter Materialien, z.B. der *travaux préparatoires* zu besagten Instrumenten, vorhandener Rechtsprechung oder der Meinung von Autoren zum Thema, besprochen.

Viertens sollen die diversen Kontrollverfahren beschrieben werden, die das Völkerrecht bereithält, um die Durchsetzung des Rechts auf Bildung zu überprüfen. Diese Kontrollverfahren können die Form von Berichtssystemen oder Staaten- oder Individualbeschwerdeverfahren annehmen. Abgesehen von einer Besprechung des Kontrollinstrumentariums des Internationalen Paktes über wirtschaftliche, soziale und kulturelle Rechte (siehe den nächsten Abschnitt), werden insbesondere die Kontrollverfahren besprochen, die im Hinblick auf UNESCOs normative Instrumente geschaffen wurden. Bezüglich der Konvention über den Kampf gegen die Diskriminierung im Unterricht, zum Beispiel, gibt es ein auf Staatenberichten basierendes Konsultationsverfahren und ein Staatenbeschwerdeverfahren. Außerdem gibt es im Rahmen der UNESCO auch noch ein Individualbeschwerdeverfahren.

Fünftens soll eine systematische Analyse von Artikel 13 des Internationalen Paktes über wirtschaftliche, soziale und kulturelle Rechte vorgenommen werden. Es wurde bereits erwähnt, dass diese Bestimmung wohl die bedeutendste Formulierung des Rechts auf Bildung in einem völkerrechtlichen Vertrag darstellt. Indem sich die Analyse auf die Bestimmung eines bestimmten Instrumentes konzentriert, ist es möglich, die vielfältigen Verpflichtungen des Staates, die aus dem Recht auf Bildung hervorgehen, gründlich und präzise zu beschreiben. Zuerst werden die generellen Verpflichtungen des Staates nach Artikel 2 Absatz 1 des Internationalen Paktes dargelegt. Danach werden dann die spezifischen Verpflichtungen des Staates nach Artikel 13 definiert. Es wird ferner untersucht, wie der

Ausschuss über wirtschaftliche, soziale und kulturelle Rechte—das Gremium, das mit der Kontrolle des Paktes betraut ist—Artikel 13 auslegt. Das Kontrollinstrumentarium des Paktes, ein Berichtssystem, wird erklärt. Es wird aufgezeigt, dass die Überprüfung der Durchsetzung von Paktrechten, einschließlich der des Rechts auf Bildung, durch die Schaffung eines Individualbeschwerdeverfahrens im Rahmen des Paktes verbessert werden kann.

Aufbau

Das vorliegende Buch wird in zwei Teile eingeteilt, einen A- und einen B-Teil. Ersterer nimmt eine allgemeine Analyse des völkerrechtlichen Schutzes des Rechts auf Bildung vor, letzterer eine systematische Analyse von Artikel 13 des Internationalen Paktes über wirtschaftliche, soziale und kulturelle Rechte.

Der *A-Teil* legt also dar, wie das Völkerrecht das Recht auf Bildung schützt. Er nennt die vielen internationalen und regionalen völkerrechtlichen Instrumente, die das Recht auf Bildung schützen, und ebensolche normativen Instrumente, die von der UNESCO und der ILO als VN-Sonderorganisationen angenommen wurden, und bespricht diese dann kurz. Es wird überdies einiges über Geschichte und Wesen des Rechts auf Bildung gesagt, über wirtschaftliche, soziale und kulturelle Rechte als die Gruppe Menschenrechte, der das Recht auf Bildung (auch) angehört, und über Tätigkeiten auf internationaler Ebene, wie internationale Konferenzen und Initiativen, die auf eine Stärkung des Rechts auf Bildung abzielen.

Der A-Teil besteht aus sechs Kapiteln, den Kapiteln 2 bis 7. Im *2. Kapitel* werden einführende Bemerkungen zum Recht auf Bildung gemacht. Themen, wie die Definition des Begriffs "Bildung", die historische Entwicklung des Rechts auf Bildung, die philosophische Rechtfertigung dieses Rechts, das Recht auf Bildung als "Befähigungsrecht", die Grundschulpflicht, die Universalität des Rechts auf Bildung, die Kategorisierung dieses Rechts, und das Recht auf Bildung als Teil des internationalen Gewohnheitsrechts werden besprochen. Das *3. Kapitel* beschäftigt sich mit der Gruppe der wirtschaftlichen, sozialen und kulturellen Rechte. Es wird versucht, die Argumente, die oft gegen wirtschaftliche, soziale und kulturelle Rechte vorgebracht werden, zu entkräften, und Argumente zur Verteidigung dieser Rechte anzuführen. Dieses ist im Rahmen einer Besprechung des Rechts auf Bildung notwendig, da die Anerkennung des Rechts auf Bildung von der Anerkennung der Gruppe der wirtschaftlichen, sozialen und kulturellen Rechte abhängt. Die darauf folgenden drei Kapitel, die Kapitel 4, 5 und 6, beschreiben dann den Schutz, den das Recht auf Bildung im Kontext

völkerrechtlicher Instrumente erfährt. Im *4. Kapitel* werden die Bestimmungen zum Recht auf Bildung in internationalen völkerrechtlichen Instrumenten besprochen (wobei die Bestimmungen in Instrumenten der VN-Sonderorganisationen außer Betracht bleiben, da diese im 6. Kapitel besprochen werden). Die betreffenden Bestimmungen der *International Bill of Human Rights*, d.h. Artikel 26 der Allgemeinen Erklärung der Menschenrechte, Artikel 13 und 14 des Internationalen Paktes über wirtschaftliche, soziale und kulturelle Rechte und Artikel 18 Absatz 4 des Internationalen Paktes über bürgerliche und politische Rechte, werden behandelt. Zudem werden Artikel 28 und 29 des Übereinkommens über die Rechte des Kindes behandelt. Das 4. Kapitel nennt außerdem die Bestimmungen zum Recht auf Bildung, die sich in Instrumenten befinden, die sich mit Diskriminierung, Flüchtlingen, Wanderarbeitnehmern, behinderten Menschen, alten Menschen, Gefangenen, Minderheiten und einheimischen Völkern befassen. Im *5. Kapitel* werden die Bestimmungen zum Recht auf Bildung in regionalen völkerrechtlichen Instrumenten besprochen. Artikel 2 des Ersten Zusatzprotokolls zur Europäischen Konvention zum Schutze der Menschenrechte und Grundfreiheiten (und wichtige Rechtsprechung der damaligen Europäischen Kommission für Menschenrechte und des Europäischen Gerichtshofs für Menschenrechte zu Artikel 2), Artikel 13 des Zusatzprotokolls zur Amerikanischen Konvention für Menschenrechte im Bereich der wirtschaftlichen, sozialen und kulturellen Rechte und Artikel 11 der Afrikanischen Charta über die Rechte und das Wohlergehen des Kindes werden behandelt. Im *6. Kapitel* werden die Bestimmungen zum Recht auf Bildung in Instrumenten, die von der UNESCO und der ILO als VN-Sonderorganisationen angenommen wurden, besprochen. Dabei fällt die Betonung auf die UNESCO-Instrumente. Nachdem die Kompetenzausstattung der UNESCO und deren Organisationsstruktur, und die Ausarbeitung internationaler Bildungsstandards und die Kontrolle dieser Standards durch die UNESCO erörtert wurden, werden die normativen Instrumente der UNESCO im Bildungsbereich und deren Überwachung besprochen. Hier fällt der Akzent auf die Konvention über den Kampf gegen die Diskriminierung im Unterricht. Abschließend wird im *7. Kapitel* kurz über Tätigkeiten auf internationaler Ebene, wie internationale Konferenzen und Initiativen, berichtet, die auf eine Stärkung des Rechts auf Bildung abzielen. Dabei wird zwei Initiativen besondere Aufmerksamkeit geschenkt, zum einen der "Schulbildung für alle"-Bewegung und zum anderen der Tätigkeit des Sonderberichterstatters der VN-Menschenrechtskommission für das Recht auf Bildung, ein Amt, das 1998 geschaffen wurde.

Der *B-Teil* nimmt dann eine systematische Analyse von Artikel 13 des Internationalen Paktes über wirtschaftliche, soziale und kulturelle Rechte vor. Der Pakt ist Bestandteil der *International Bill of Human Rights*, die universell

gültige Menschenrechtsstandards zu definieren beansprucht. Der Ausschuss über wirtschaftliche, soziale und kulturelle Rechte, der mit der Kontrolle des Paktes betraut ist, hat ferner diverse Materialien, wie z.B. "Allgemeine Bemerkungen", erarbeitet, die der Auslegung von Paktrechten, einschließlich der des Rechts auf Bildung, dienen. Diese Überlegungen rechtfertigen im B-Teil eine Analyse des Rechts auf Bildung, wie es in Artikel 13 des Internationalen Paktes über wirtschaftliche, soziale und kulturelle Rechte gewährleistet wird. Die Analyse stützt sich nicht so sehr auf die *travaux préparatoires* zum Pakt, als vielmehr auf die bereits genannten Auslegungshilfen des Ausschusses über wirtschaftliche, soziale und kulturelle Rechte, insbesondere die 11. und 13. "Allgemeine Bemerkung". Aber auch viele andere Hilfsmittel werden herangezogen, so z.B. die einschlägige Rechtsprechung der damaligen Europäischen Kommission für Menschenrechte und des Europäischen Gerichtshofs für Menschenrechte, und die verschiedenen Berichte des Sonderberichterstatters der VN-Menschenrechtskommission für das Recht auf Bildung.

Der B-Teil besteht aus fünf Kapiteln, den Kapiteln 8 bis 12. Im *8. Kapitel* wird das Kontrollinstrumentarium des Internationalen Paktes über wirtschaftliche, soziale und kulturelle Rechte, ein Berichtssystem, beschrieben. Die Vertragsstaaten verpflichten sich, Berichte über die von ihnen getroffenen Maßnahmen hinsichtlich der Verwirklichung von Paktrechten vorzulegen, die dann durch den Ausschuss über wirtschaftliche, soziale und kulturelle Rechte geprüft werden. Die Besprechung geht auf die verschiedenen Tätigkeiten des Ausschusses, die von ihm erzeugte "Rechtsprechung" und den rechtlichen Charakter dieser "Rechtsprechung" ein. Das *9. Kapitel* befasst sich mit den allgemeinen Paktbestimmungen. Artikel 2 Absatz 1, Artikel 2 Absatz 2 und Artikel 4 werden untersucht. Artikel 2 Absatz 1 beschreibt die generellen Verpflichtungen des Staates hinsichtlich der Verwirklichung von Paktrechten, Artikel 2 Absatz 2 gewährleistet die Ausübung von Paktrechten ohne Diskriminierung und Artikel 4 erlaubt unter bestimmten Bedingungen Einschränkungen in der Ausübung von Paktrechten. Die Besprechung des Diskriminierungsverbots nach Artikel 2 Absatz 2 beinhaltet u.a. eine ausführliche Auseinandersetzung mit den Rechten von Minderheiten im Bildungsbereich. Das *10. Kapitel* untersucht sodann Artikel 13 des Paktes. Die verschiedenen Teilaspekte von Artikel 13 werden unter die Lupe genommen. Diese sind das allgemein formulierte Recht auf Bildung nach Artikel 13 Absatz 1 Satz 1, die Bildungsziele nach Artikel 13 Absatz 1 Satz 2 und 3, die soziale Komponente des Rechts auf Bildung, die in Artikel 13 Absatz 2 ihren Niederschlag findet (die Verpflichtung der Vertragsstaaten, ein Bildungssystem zu verwirklichen, das Grundschulunterricht, Unterricht im höheren Schulwesen, Hochschulunterricht und grundlegende Bildungsmöglichkeiten anbietet), und die freiheitliche Komponente

des Rechts auf Bildung, die in Artikel 13 Absatz 3 und 4 ihren Niederschlag findet (die Verpflichtung der Vertragsstaaten, die Freiheit der Eltern zu achten, für ihre Kinder Privatschulen zu wählen sowie die religiöse und sittliche Erziehung ihrer Kinder in Übereinstimmung mit ihren eigenen Überzeugungen sicherzustellen, und die Verpflichtung der Vertragsstaaten, die Freiheit von Personen zu achten, Privatschulen zu schaffen und zu leiten). Im *11. Kapitel* werden die "Abschließenden Bemerkungen" des Ausschusses über wirtschaftliche, soziale und kulturelle Rechte analysiert, insofern als diese Bezug auf das Recht auf Bildung nach Artikel 13 nehmen. "Abschließende Bemerkungen" werden im Anschluss an die Prüfung der Staatenberichte durch den Ausschuss angenommen und nehmen Stellung zum Stand der Verwirklichung der Paktrechte in einem bestimmten Vertragsstaat. Sie stellen eine wichtige Methode zur Konkretisierung der Paktnormen dar. Abschließend wird im *12. Kapitel* angeregt, "Bildung" als "Menschenrecht" zu stärken, indem man den Humankapital-Ansatz im Bildungsbereich deutlich ablehnt, freien Handel mit Bildungsdienstleistungen klar beschränkt und außerdem das Recht auf Bildung in der bilateralen und multilateralen Entwicklungszusammenarbeit im Bildungssektor achtet. Des Weiteren werden Vorschläge gemacht, wie die Überprüfung der Durchsetzung von Artikel 13 im Rahmen des Paktes verbessert werden kann. Zum einen wird argumentiert, dass das bisherige Berichtssystem optimiert werden sollte. Zum anderen sollte ein Fakultativprotokoll zum Pakt, das ein Individualbeschwerdeverfahren vorsieht, angenommen werden. Beschwerden würden durch den Ausschuss über wirtschaftliche, soziale und kulturelle Rechte geprüft. Der Ausschuss hätte die Aufgabe, "Verletzungen" der Paktrechte, eben auch solche von Artikel 13, festzustellen.

CURRICULUM VITAE

My name is Klaus Dieter Beiter. I was born on 5 September 1972 in Windhoek, Namibia. In 1990, I matriculated at the *Deutsche Oberschule Windhoek*, by passing the Senior Certificate Examination (Cape Education Department, South Africa). From 1992 until 1996, I studied law at the University of South Africa (Unisa) in Pretoria, South Africa, obtaining the *BIuris* degree in 1994 and the *LLB* degree in 1996, both degrees "with distinction". In 1997, I was awarded Unisa's *LLB* Prize and further the Johannes Voet Medal, sponsored by the Pretoria Society of Advocates. During my *LLB* studies, I specialised in two fields: on the one hand, constitutional law, human rights law and public international law and, on the other, legal history, legal philosophy, comparative law and private international law. In 1997, I underwent practical legal training at Olivier's Law Office in Windhoek, Namibia. In that year, I also obtained the Certificate in Law Practice, issued by the Board for Legal Education of Namibia. In 1998 then, I was admitted as a Legal Practitioner of the High Court of Namibia. From April 1999 until March 2000, I studied German civil, criminal and public law at the Ludwig-Maximilians-Universität (LMU) in Munich, Germany, and on completion of these studies was awarded the *Zertifikat über ein erfolgreiches Studium der Grundzüge des deutschen Rechtes*. Subsequently, I did the research for and wrote my doctoral thesis, which I handed in in 2003. The thesis received the LMU Faculty of Law's Faculty Prize 2004. In 2004, I worked for *IPR Verlag* ("Private International Law Publishers") in Munich, my responsibilities there encompassing the translation of legal texts, legal research and editorial work.

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